The New Straits Times Press (M) Bhd v Aideah Communication Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-30–08 OF 2024 (W)
ZABARIAH YUSOF, ABDUL KARIM AND AHMAD TERRIRUDIN FCJJ
8 APRIL 2025

Contract — Terms — Construction of clause — Parties entered into series of revenue sharing agreements for respondent's provision of editorial content and securing of advertisements in appellant's newspapers — Respondent claimed unpaid commission invoices from appellant — Appellant counterclaimed to set off amount from respondent for alleged shortfall in minimum guaranteed sum ('MGS') under 2013 agreement, asserting that respondent failed to fulfil its contractual obligation to achieve MGS for year 2015 — Whether there was operative provision in 2013 agreement for MGS — Whether 'reasonable endeavours' clause could negate consideration obligation as set out in ss 10(1) and 26 of Contracts Act 1950 — Whether effect of 'reasonable endeavours' clause in any contract created uncertainty and ambiguity by dissolving rights, liabilities and obligations of parties in said contract considering ss 30 and 71 of Contracts Act 1950 — Whether courts could rewrite transaction/contracts for parties in event of ambiguous and/or contradictory clause in commercial contract, considering Contracts Act 1950 and established common law to contrary — Whether contra proferentum rule took precedence over other modes of construction or should it be used as last resort when there was ambiguity and/or contradiction in terms of contract, considering past course of dealings between parties — Whether burden of proof to enable reliance on 'reasonable endeavours' clause in contract lied on obligor — Whether principle of generalia specialibus non derogant was to be applied when construing specific contractual obligation over general 'reasonable endeavours' clause

The respondent ('plaintiff') was a company that produced motor-related editorial content. The appellant ('defendant') was the owner and publisher of various newspapers. The plaintiff and the defendant entered into a series of revenue sharing agreements between 2003 and 2013 for the plaintiff's provision of editorial content and the securing of advertisements in the defendant's newspapers. The salient feature of these agreements required the plaintiff to secure annual minimum revenue based on the net advertising revenue to be earned by the defendant in respect of the plaintiff's publication in the defendant's newspapers termed as the minimum guaranteed sum ('MGS'). The defendant demanded payment of RM1,589,947.74 from the plaintiff for the alleged MGS shortfall under the 2013 agreement by issuing contract surcharge invoices. The plaintiff pursued payment totaling

A RM1,199,874.72 from the defendant in respect of the commission invoices. The defendant did not deny the amount owing to the plaintiff but claimed it was entitled to set off the amount premised on the plaintiff failure to fulfil its contractual obligation to achieve the MGS for the year 2015 and consequently to remit the required sum to the defendant in accordance to the agreed formula
B under cl 4 of the 2013 agreement. Following the parties' failure to amicably resolve their differences, the plaintiff initiated a High Court suit. The learned High Court judge dismissed the plaintiff's claim and allowed the defendant's counterclaim. The plaintiff appealed against the decision and the Court of Appeal in allowing the plaintiff's appeal found that: (a) the dominant provision
C when read as a whole, contextually, was cl 4.3 which plainly provided that the plaintiff was only required to use reasonable endeavour to ensure that the MGS was met; (b) even if the provisions in cll 1 and 4 of the 2013 agreement were ambiguous, they must nonetheless be read contra proferentem and construed
D against the defendant since the 2013 agreement was proffered by the defendant; and (c) the defendant had not led sufficient evidence to satisfy the court that the plaintiff did not use its reasonable endeavour required under cl 4.3 to find any liability on the part of the plaintiff in justification of its set off and counterclaim. The defendant was granted leave to appeal on the following
E questions of law: (i) whether a 'reasonable endeavours' clause could negate the consideration obligation as set out in ss 10(1) and 26 of the Contracts Act 1950 ('question 1'); (ii) whether the effect of a 'reasonable endeavours' clause in any contract created uncertainty and ambiguity by dissolving the rights, liabilities and obligations of the parties in the said contract considering
F ss 30 and 71 of the Contracts Act 1950 ('question 2'); (iii) in the event of an ambiguous and/or contradictory clause in a commercial contract, could the courts rewrite the transaction/contracts for the parties, considering the Contracts Act 1950 and established common law to the contrary ('question 3'); (iv) when there was ambiguity and/or contradiction in the terms of a contract,
G considering the past course of dealings between of the parties, whether contra proferentum rule took precedence over other modes of construction or should it be used as the last resort having regard to the decision of *McGeown v Direct Travel Insurance* [2004] 1 All ER (Comm) 609; [2003] EWCA Civ 1606 and *470 St Kilda Road Pty Ltd v Robinson* (2013) 308 ALR 411 ('question 4');
H (v) whether the burden of proof to enable the reliance on a 'reasonable endeavours' clause in a contract lied on the obligor ('question 5'); and (vi) whether the principle of generalia specialibus non derogant was to be applied when construing a specific contractual obligation over a general 'reasonable endeavours' clause ('question 6').

I **Held**, dismissing the appeal:

(1) Clause 14 and s 92 of the Evidence Act 1950 ('the EA') did not preclude the court from referring to the pre-2013 agreements as these agreements served as evidence of the objective factual background known to the

parties and were reasonably available to them. There was no specific operative provision in the 2013 agreement for MGS. Nowhere the phrase 'Minimum Guaranteed Sum' or 'guarantee' occurred in cll 4.1 and 4.2. It was clear from a plain reading of cll 4.1 and 4.2 that there was no provision creating a liability on the part of the plaintiff to fulfil any specific amount to the defendant as an absolute and unconditional obligation under the 2013 agreement. The thresholds set by cll 4.1 and 4.2 were merely soft target and projection to be fulfilled by the plaintiff based on the standard of reasonable endeavour. The plaintiff's subsequent conduct, in the form of acknowledgment or affirmation in the letter, email and meeting minutes could not be used as extrinsic evidence to contradict cl 4.3 or to add the terms 'Minimum Guaranteed Sum' or 'guarantee' into cll 4.1 and 4.2. Neither could they be used to show the real intention of the parties regarding cll 4.1 and 4.2. Nor did the court consider such conduct and documents arising long after contract formation to be an acceptable background as an interpretative aid to explain or introduce into cll 4.1 and 4.2 something that was not there (see paras 44, 47, 49 & 54).

(2) The operation of cll 4.1 and 4.2 was guided by the standard of 'reasonable endeavour' as set out under cl 4.3. The phrase 'reasonable endeavour' was not merely generic English words of common usage in standard clause but an enforceable contract term that extended beyond a cosmetic existence carrying important legal implications and serving as a criterion for evaluating correct contractual performance. The inclusion of a 'reasonable endeavours' clause provided a pragmatic and commercially sensible approach aligning the plaintiff's obligations with the unpredictable dynamics of the advertising industry. It followed that the 'reasonable endeavours' clause functions as a soft target establishing a practical benchmark for the plaintiff's performance that reflected the parties' intentions at the time the 2013 agreement was executed. The defendant's contention that a 'reasonable endeavour' clause negated the plaintiff's consideration obligation under the 2013 agreement contrary to ss 10(1) and 26 of the Contracts Act 1950 was without merit. Further, giving effect to reasonable endeavour clauses would not introduce uncertainty into contractual relationships by making obligations indefinite and potentially undermining parties' rights and liabilities contrary to ss 30 and 71 of the Contracts Act 1950 as contended by the defendant. Therefore, questions 1 and 2 was answered in the negative (see paras 72, 79, 90, 96–97).

(3) The Court of Appeal had directed itself to a consideration that the contra proferentem rule should apply if there was an ambiguity. Ample analysis and appreciation of the law and relevant rules of contract interpretation were made prior to the Court of Appeal's comment. The Court of Appeal did not hastily invoke the contra proferentem rule as the primary

solution. The case *Malaysian Motor Insurance Pool v Tirumeniyar a/l Singara Veloo* [2020] 1 MLJ 440 cited by the Court of Appeal had clearly reiterated the underlying principles of contra proferentem rule quite similar to the observations of Auld LJ in *McGeown v Direct Travel Insurance* [2004] 1 All ER (Comm) 609; [2003] EWCA Civ 1606. The Court of Appeal was mindful of the contours of the contra proferentem rule. There were no ambiguities or inconsistencies in the terms or clauses in the 2013 agreement nor was this the finding of the Court of Appeal. Therefore, the defendant's contention was without merit and question 4 was declined to be answered as it did not have any impact on the outcome of this appeal. Similarly, question 3 was also declined to be answered as it was simply irrelevant in the context of the present appeal where the question assumed that the 2013 agreement was ambiguous (see paras 101 & 108–111)

(4) The burden of proof in reliance on a reasonable endeavours clause fell first on the obligee ie the defendant. Unlike in the case of a guaranteed undertaking where it was sufficient for the obligee to prove that the aim for the contractually guaranteed result has not been procured, in the case of an obligation of reasonable endeavour, proof of the promised result was not achieved was not sufficient since the mere fact that the result had not been achieved did not necessarily mean that the obligor had not properly performed its obligation. It was incumbent upon the obligee to prove that the obligor had not discharged its obligation with the reasonable diligence required. The burden of proof did not shift to the plaintiff as contended by the defendant. The burden of proof lied with the defendant as the obligee was consistent with the classic juridical aphorism 'semper necessitas probandi incumbit ei qui agit' (he who asserts must prove) which was statutorily recognised by s 101 of the EA. Therefore, question 5 was answered in the negative (see paras 125–126 & 129–130).

(5) Canons of construction should be applied only when the language of the contract was ambiguous. The *generalia specialibus* maxim specifically resolved ambiguities that emerged when two provisions were examined together. Clauses 4.1 and 4.2 provided for the desired results to be achieved without any guarantee whereas cl 4.3 provided for the standard for performance. There was no inconsistency between these clauses so that one could say the general was taken to give way to the specific. Therefore, the generalia specialibus maxim did not offer much help to the defendant's case and question 6 was declined to be answered (see paras 139, 143–144 & 148)

[Bahasa Malaysia summary

Responden ('plaintif') adalah sebuah syarikat yang menghasilkan kandungan editorial berkaitan permotoran. Perayu ('defendan') adalah pemilik dan

penerbit pelbagai akhbar. Plaintif dan defendan memeterai beberapa siri perjanjian perkongsian hasil antara 2003 dan 2013 bagi penyediaan kandungan editorial oleh plaintif dan pemerolehan iklan dalam akhbar-akhbar defendan. Ciri utama perjanjian-perjanjian ini memerlukan plaintif untuk mendapatkan hasil minimum tahunan berdasarkan hasil bersih iklan yang diperolehi oleh defendan berkenaan penerbitan plaintif dalam akhbar-akhbar defendan yang disebut sebagai jumlah jaminan minimum ('MGS'). Defendan menuntut bayaran sebanyak RM1,589,947.74 daripada plaintif bagi dakwaan kekurangan MGS di bawah perjanjian 2013 dengan mengeluarkan invois-invois surcaj kontrak. Plaintif meneruskan tuntutan bayaran berjumlah RM1,199,874.72 daripada defendan berkenaan dengan invois-invois komisen. Defendan tidak menafikan jumlah yang terhutang kepada plaintif tetapi mendakwa ia berhak untuk menolak jumlah tersebut berdasarkan kegagalan plaintif untuk memenuhi kewajipan kontraknya untuk mencapai MGS bagi tahun 2015 dan seterusnya meremitkan jumlah yang diperlukan kepada defendan mengikut formula yang dipersetujui di bawah klausa 4 perjanjian 2013. Berikutan kegagalan pihak-pihak untuk menyelesaikan perselisihan mereka secara baik, plaintif memulakan guaman di Mahkamah Tinggi. Hakim Mahkamah Tinggi yang bijaksana menolak tuntutan plaintif dan membenarkan tuntutan balas defendan. Plaintif merayu terhadap keputusan tersebut dan Mahkamah Rayuan dalam membenarkan rayuan plaintif mendapati bahawa: (a) peruntukan dominan apabila dibaca secara keseluruhan, dari segi konteks, adalah klausa 4.3 yang jelas memperuntukkan bahawa plaintif hanya dikehendaki menggunakan usaha yang munasabah untuk memastikan bahawa MGS dipenuhi; (b) walaupun peruntukan-peruntukan dalam klausa 1 dan 4 perjanjian 2013 adalah kabur, ia mesti dibaca secara contra proferentem dan ditafsirkan terhadap defendan kerana perjanjian 2013 dikemukakan oleh defendan; dan (c) defendan tidak mengemukakan keterangan yang mencukupi untuk memuaskan hati mahkamah bahawa plaintif tidak menggunakan usaha yang munasabah yang diperlukan di bawah klausa 4.3 untuk mencari sebarang liabiliti di pihak plaintif sebagai justifikasi penolakan dan tuntutan balasnya. Defendan telah diberikan kebenaran untuk merayu atas persoalan undang-undang berikut: (i) sama ada klausa 'usaha yang munasabah' boleh menafikan kewajipan pertimbangan seperti yang dinyatakan dalam ss 10(1) dan 26 Akta Kontrak 1950 ('soalan 1'); (ii) sama ada kesan klausa 'usaha yang munasabah' dalam mana-mana kontrak mewujudkan ketidakpastian dan kekaburan dengan menghapuskan hak, liabiliti dan obligasi pihak-pihak dalam kontrak tersebut dengan mengambil kira ss 30 dan 71 Akta Kontrak 1950 ('soalan 2'); (iii) sekiranya terdapat klausa yang kabur dan/atau bercanggah dalam kontrak komersial, bolehkah mahkamah menulis semula transaksi/kontrak untuk pihak-pihak, dengan mengambil kira Akta Kontrak 1950 dan undang-undang lazim yang mantap yang bertentangan ('soalan 3'); (iv) apabila terdapat kekaburan dan/atau percanggahan dalam terma-terma kontrak, dengan mengambil kira urusan-urusan lalu antara pihak-pihak, sama ada peraturan

A contra proferentum diutamakan berbanding cara-cara pembinaan lain atau sama ada ia patut digunakan sebagai jalan terakhir dengan mengambil kira keputusan *McGeown v Direct Travel Insurance* [2004] 1 All ER (Comm) 609; [2003] EWCA Civ 1606 dan *470 St Kilda Road Pty Ltd v Robinson* (2013) 308 ALR 411 ('soalan 4'); (v) sama ada beban pembuktian untuk B membolehkan pergantungan pada klausa 'usaha yang munasabah' dalam kontrak terletak pada penanggung obligasi ('soalan 5'); dan (vi) sama ada prinsip generalia specialibus non derogant patut digunakan apabila mentafsir kewajipan kontrak tertentu berbanding klausa umum 'usaha yang munasabah' ('soalan 6').

C

Diputuskan, menolak rayuan:

(1) Klausa 14 dan s 92 Akta Keterangan 1950 ('AK') tidak menghalang mahkamah daripada merujuk kepada perjanjian-perjanjian sebelum 2013 kerana perjanjian-perjanjian ini berfungsi sebagai keterangan latar D belakang fakta objektif yang diketahui oleh pihak-pihak dan tersedia secara munasabah kepada mereka. Tiada peruntukan operatif khusus dalam perjanjian 2013 untuk MGS. Tiada di mana-mana frasa 'Jumlah Jaminan Minimum' atau 'jaminan' berlaku dalam klausa 4.1 dan 4.2. Jelas daripada pembacaan biasa klausa 4.1 dan 4.2 bahawa tiada E peruntukan yang mewujudkan liabiliti di pihak plaintif untuk memenuhi sebarang jumlah tertentu kepada defendan sebagai kewajipan mutlak dan tanpa syarat di bawah perjanjian 2013. Ambang yang ditetapkan oleh klausa 4.1 dan 4.2 hanyalah sasaran dan unjuran yang F perlu dipenuhi oleh plaintif berdasarkan standard usaha yang munasabah. Kelakuan plaintif berikutnya, dalam bentuk pengakuan atau penegasan dalam surat, emel dan minit mesyuarat tidak boleh digunakan sebagai keterangan luaran untuk bercanggah dengan klausa 4.3 atau untuk menambah terma 'Jumlah Jaminan Minimum' atau 'jaminan' ke G dalam klausa 4.1 dan 4.2. Ia juga tidak boleh digunakan untuk menunjukkan niat sebenar pihak-pihak mengenai klausa 4.1 dan 4.2. Mahkamah juga tidak menganggap kelakuan dan dokumen sedemikian yang timbul lama selepas pembentukan kontrak sebagai latar belakang yang boleh diterima sebagai bantuan tafsiran untuk menjelaskan atau H memperkenalkan ke dalam klausa 4.1 dan 4.2 sesuatu yang tidak ada (lihat perenggan 44, 47, 49 & 54).

(2) Operasi klausa 4.1 dan 4.2 dipandu oleh standard 'usaha yang munasabah' seperti yang dinyatakan di bawah klausa 4.3. Frasa 'usaha yang munasabah' bukanlah sekadar perkataan generik Bahasa Inggeris I yang biasa digunakan dalam klausa standard tetapi terma kontrak yang boleh dikuatkuasakan yang melangkaui kewujudan kosmetik yang membawa implikasi undang-undang yang penting dan berfungsi sebagai kriteria untuk menilai prestasi kontrak yang betul. Kemasukan klausa 'usaha yang munasabah' menyediakan pendekatan yang pragmatik dan

munasabah dari segi komersial yang menjajarkan kewajipan plaintif dengan dinamik industri pengiklanan yang tidak dapat diramalkan. Oleh itu, klausa 'usaha yang munasabah' berfungsi sebagai sasaran yang mewujudkan penanda aras praktikal untuk prestasi plaintif yang mencerminkan niat pihak-pihak pada masa perjanjian 2013 dilaksanakan. Hujah defendan bahawa klausa 'usaha yang munasabah' menafikan kewajipan pertimbangan plaintif di bawah perjanjian 2013 yang bertentangan dengan ss 10(1) dan 26 Akta Kontrak 1950 adalah tidak berasas. Selanjutnya, memberi kesan kepada klausa usaha yang munasabah tidak akan memperkenalkan ketidakpastian ke dalam hubungan kontrak dengan menjadikan kewajipan tidak terhad dan berpotensi menjejaskan hak dan liabiliti pihak-pihak yang bertentangan dengan ss 30 dan 71 Akta Kontrak 1950 seperti yang didakwa oleh defendan. Oleh itu, soalan 1 dan 2 dijawab secara negatif (lihat perenggan 72, 79, 90, 96–97).

(3) Mahkamah Rayuan telah mengarahkan pertimbangan bahawa peraturan contra proferentem harus digunakan jika terdapat kekaburan. Analisis dan penghayatan yang mencukupi terhadap undang-undang dan kaedah-kaedah tafsiran kontrak yang relevan telah dibuat sebelum ulasan Mahkamah Rayuan. Mahkamah Rayuan tidak tergesa-gesa menggunakan kaedah contra proferentem sebagai penyelesaian utama. Kes *Malaysian Motor Insurance Pool v Tirumeniyar a/l Singara Veloo* [2020] 1 MLJ 440 yang dipetik oleh Mahkamah Rayuan telah dengan jelas mengulangi prinsip-prinsip asas peraturan contra proferentem yang hampir sama dengan pemerhatian Auld LJ dalam *McGeown v Direct Travel Insurance* [2004] 1 All ER (Comm) 609; [2003] EWCA Civ 1606. Mahkamah Rayuan sedar akan batasan peraturan contra proferentem. Tiada kekaburan atau ketidakselarasan dalam terma-terma atau klausa-klausa dalam perjanjian 2013 dan ini juga bukan penemuan Mahkamah Rayuan. Oleh itu, hujah defendan adalah tidak bermerit dan soalan 4 ditolak untuk dijawab kerana ia tidak mempunyai sebarang kesan ke atas hasil rayuan ini. Begitu juga, soalan 3 juga ditolak untuk dijawab kerana ia tidak relevan dalam konteks rayuan ini di mana soalan tersebut mengandaikan bahawa perjanjian 2013 adalah kabur (lihat perenggan 101 & 108–111).

(4) Beban pembuktian dalam pergantungan pada klausa usaha yang munasabah terletak terlebih dahulu pada penerima obligasi iaitu defendan. Tidak seperti dalam kes aku janji terjamin di mana adalah mencukupi bagi penerima obligasi untuk membuktikan bahawa matlamat untuk hasil yang dijamin secara kontrak tidak diperolehi, dalam kes kewajipan usaha yang munasabah, bukti hasil yang dijanjikan tidak dicapai adalah tidak mencukupi kerana semata-mata fakta bahawa hasil tersebut tidak dicapai tidak semestinya bermakna bahawa penanggung obligasi tidak melaksanakan kewajipannya dengan betul.

Adalah menjadi tanggungjawab penerima obligasi untuk membuktikan bahawa penanggung obligasi tidak melaksanakan kewajipannya dengan ketelitian yang munasabah yang diperlukan. Beban pembuktian tidak beralih kepada plaintif seperti yang didakwa oleh defendan. Beban pembuktian terletak pada defendan sebagai penerima obligasi adalah selaras dengan aforisme jurudikal klasik 'semper necessitas probandi incumbit ei qui agit' (dia yang mendakwa mesti membuktikan) yang diiktiraf secara berkanun oleh s 101 AK. Oleh itu, soalan 5 dijawab secara negatif (lihat perenggan 125–126 & 129–130).

(5) Kanun pembinaan patut digunakan hanya apabila bahasa kontrak itu kabur. Maksim generalia specialibus secara khusus menyelesaikan kekaburan yang timbul apabila dua peruntukan diperiksa bersama. Klausa 4.1 dan 4.2 memperuntukkan hasil yang diingini untuk dicapai tanpa sebarang jaminan manakala klausa 4.3 memperuntukkan piawaian prestasi. Tiada ketidakselarasan antara klausa-klausa ini sehingga seseorang boleh mengatakan umum diambil untuk memberi laluan kepada yang khusus. Oleh itu, maksim generalia specialibus tidak membantu kes defendan dan soalan 6 ditolak untuk dijawab (lihat perenggan 139, 143–144 & 148).]

Cases referred to

470 St Kilda Road Pty Ltd v Robinson (2013) 308 ALR 411, FC (refd)
AIB Group (UK) Ltd v Martin and another [2002] 1 WLR 94, HL (refd)
Allied Capital Sdn Bhd v Mohd Latiff bin Shah Mohd, & another application [2005] 3 MLJ 1, FC (refd)
Arnold v Britton and others [2015] UKSC 36, SC (folld)
Capita Business Services Ltd v IBM United Kingdom Ltd and another company [2023] All ER (D) 127 (Oct); [2023] EWHC 2623 (Comm), KBD (refd)
Chase Perdana Bhd v Md Afendi bin Hamdan [2009] 6 MLJ 783, FC (refd)
Chwee Kin Keong and Others v Digilandmall.com Pte Ltd [2005] 2 LRC 28, HC (refd)
CLP Holding Company Ltd v Singh and another [2014] All ER (D) 08 (Oct); [2014] EWCA Civ 1103, CA (refd)
Compass Group UK and Ireland Ltd (t/a Medirest) v Mid Essex Hospital Services NHS Trust [2013] EWCA Civ 200, CA (refd)
Curtis v Stovin (1889) 22 QBD 513, CA (refd)
EDI Central Ltd v National Car Parks Ltd [2011] SLT 76 (refd)
Effort Shipping Co Ltd v Linden Management SA and another; The Giannis NK [1998] 1 All ER 495, HL (refd)
Electricity Generation Corporation (t/as Verve Energy) v Woodside Energy Ltd [2014] HCA 7, HC (refd)
Forbes v Git & Ors [1922] 1 AC 256, PC (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)

Glynn v Margetson & Co [1893] AC 351, HL (refd)
Golden Fleece Maritime Inc and another v St Shipping and Transport Inc [2008] EWCA Civ 584, CA (refd)
Greaves & Co (Contractors) Ltd v Baynham Meikle and Partners [1975] 3 All ER 99, CA (refd)
Guthrie Waugh Bhd v Malaiappan Muthuchumaru [1972] 2 MLJ 62, FC (refd)
Heisler v Anglo-Dal Ld [1954] 1 WLR 1273, CA (refd)
Hewden Tower Cranes Limited v Yarm Road Limited and another [2003] EWCA Civ 1127, CA (refd)
Hospital Products Ltd v United States Surgical Corp (Hospital Products/Surgical Staples case) (1984) 156 CLR 41, HC (refd)
India (President of) v Jebsens (UK) Ltd, The General Capinpin, Proteus, Free Wave and Dinara [1991] 1 Lloyd's Rep 1, HL (refd)
Inntrepreneur Pub Co v East Crown [2000] 2 Lloyd's Rep 611, Ch D (refd)
Investors Compensation Scheme v West Bromwich Building Society [1998] 1 WLR 896, HL (refd)
James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] AC 583, HL (refd)
KS Energy Services Ltd v BR Energy (M) Sdn Bhd [2014] SGCA 16, CA (refd)
Kumpulan Prasarana Rakyat Johor Sdn Bhd v Emercon Bina Sdn Bhd and another appeal [2021] 1 MLJ 629, CA (refd)
Malaysian Motor Insurance Pool v Tirumeniyar a/l Singara Veloo [2020] 1 MLJ 440; [2019] 10 CLJ 731, FC (refd)
Mana v Fleming [2007] NZCA 324, CA (refd)
Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749, HL (refd)
Marley v Rawlings and another [2014] 1 All ER 807, SC (refd)
McGeown v Direct Travel Insurance [2004] 1 All ER (Comm) 609; [2003] EWCA Civ 1606, CA (refd)
Milton Furniture Ltd v Brit Insurance Ltd [2015] All ER (D) 82 (Jul); [2015] EWCA Civ 671, CA (refd)
Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67, FC (refd)
Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Berhad [1989] 3 MLJ 155, FC (refd)
Qatar Islamic Bank v Asian Finance Bank Bhd & Ors [2015] 7 MLJ 445, HC (refd)
Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) and Sanko Steamship Co [1976] 1 WLR 989, HL (refd)
Rhodia International Holdings Ltd and another v Huntsman International LLC [2007] All ER (D) 264 (Feb), QBD (refd)
Sabah Forest Industries Sdn Bhd v UNP Plywood Sdn Bhd [2010] 1 MLJ 765, FC (refd)
Sattva Capital Corp v Creston Moly Corp [2014] SCJ No 53, FC (refd)
Shogun Finance Ltd v Hudson [2004] 1 AC 919, HL (refd)

Sirius International Insurance Co (Publ) v FAI General Insurance Ltd and others [2004] 1 WLR 3251, HL (folld)
T Niall Welch, Plaintiff, v Bowmaker (Ireland) Limited and The Governor and Company of the Bank of Ireland, Defendants [1980] IR 251, SC (refd)
Tan Chiw Thoo v Tee Kim Kuay [1997] 2 MLJ 221, FC (refd)
Tan Chong & Sons Motor Company (Sdn) Berhad v Alan McKnight [1983] 1 MLJ 220, FC (refd)
Telewest Communications plc and another v Commissioners of Customs And Excise [2005] EWCA Civ 102, CA (refd)
Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal [2018] 2 MLJ 177, FC (refd)
Tengku Dato' Kamal Ibni Sir Sultan Abu Bakar & Ors v Bursa Malaysia Securities Bhd [2022] 3 MLJ 294, FC (refd)
The Pacific Bank Bhd (sued as guarantor) v Kerajaan Negeri Sarawak [2013] MLJU 1564 [2014] 6 MLJ 153; [2015] 3 CLJ 717, FC (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd and Others (2004) 211 ALR 342, HC (refd)
Transfield Pty Ltd v Arlo International Ltd (1980) 144 CLR 83, HC (refd)
William Sindall plc v Cambridgeshire County Council [1994] 3 All ER 932, CA (refd)
Williams v Roffey Bros and Nicholls (Contractors) Ltd [1990] 1 All ER 512, CA (refd)

Legislation referred to

Contracts Act 1950 ss 10(1), 26, 30, 71, 75
Evidence Act 1950 ss 91, 92, 101

Appeal from: *Aideah Communication Sdn Bhd v The New Straits Times Press (M) Bhd* [2024] 6 MLJ 40 (Court of Appeal, Putrajaya).

Firoz Hussein (Saritha Devi Kirupalani, Choo Shi Jin, Nur Nabila Roslee and Harel Nieryan with him) (Firoz Julian) for appellant.
DP Naban (Bahari Yeow Tien Hong, Amina Qistina bt Mohd Idris with him) (Rosli Dahlan Saravana & Partnership) for respondent.

Ahmad Terrirudin FCJ:

INTRODUCTION

[1] This matter came up before us on 15 January 2025. We heard oral submissions from learned counsel representing the respective parties. At the conclusion of those submissions, we were unable to render a decision on that day. Therefore, we informed learned counsel that additional time was needed to consider the respective submissions and that they would be notified once a

decision had been reached regarding this appeal. We have made our decision and here are the reasons for our judgment. In this judgment, parties will be referred to as they were in the High Court. A

[2] The present appeal arose from the Court of Appeal's decision allowing the plaintiff's appeal against the Kuala Lumpur High Court's decision which dismissed the plaintiff's claim for declaratory orders and allowed the defendant's counterclaim. B

[3] The plaintiff is a company founded and managed by a veteran motoring journalist, Mr Ahmad Yamin Vong Abdullah. The plaintiff produces motor-related editorial content. C

[4] The defendant is the owner and publisher of various newspapers such as *New Straits Times*, *New Sunday Times*, *Berita Harian* and *BH Ahad*. D

[5] At the heart of this appeal, the dispute forming the main subject of contention between the parties for our determination concerns the true construction of cll 4.1, 4.2 and 4.3 of the agreement for production of an editorial publication called 'Car, Bikes and Trucks and Berita Harian AUTO' ('2013 agreement') entered into between them. The leave questions framed by the defendant primarily relate to these important clauses. E

[6] Upon hearing their learned counsel and after anxious consideration, we were constrained to dismiss this appeal. F

SALIENT FACTS

[7] We respectfully adopt the facts of the appeal as painstakingly set out by the parties in their written submissions and the documents in the appeal records with some modifications. G

[8] The plaintiff and the defendant entered into a series of revenue sharing agreements between 2003 and 2013 for the plaintiff's provision of editorial content and the securing of advertisements in the defendant's *New Straits Times* and *New Sunday Times* newspapers entitled 'Cars, Bikes and Trucks' ('CBT'). H

[9] In 2007, the transaction expanded whereby the plaintiff was contracted to provide similar services for the defendant's *Berita Harian* and *Berita Mingguan* newspapers entitled 'Berita Harian Auto' ('AUTO'). I

[10] In total, the parties executed the following agreements:

No	Agreement name	Date	Effective period
i	2003 CBT agreement	18 June 2003	1 June 2003 – 31 May 2006
ii	2007 CBT agreement	21 March 2007	1 June 2006 – 31 May 2009
iii	2007 AUTO agreement	3 October 2007	13 July 2007 – 12 July 2010
iv	2010 (CBT and AUTO) agreement	19 March 2010	1 January 2010 – 1 January 2013
v	2013 (CBT and AUTO) agreement	Undated	1 January 2013 – 31 December 2015

[11] Under the revenue sharing formula of these agreements, the plaintiff was entitled to be paid 40% of the net advertising revenue generated by CBT and AUTO while the defendant was entitled to 60%.

[12] The 2003, 2007 and 2010 agreements generally contain similar terms. The salient feature of these agreements required the plaintiff to secure annual minimum revenue based on the net advertising revenue to be earned by the defendant in respect of the plaintiff's publication for CBT and AUTO in the defendant's newspapers termed as the minimum guaranteed sum ('MGS'). However, whether the 2013 agreement contains terms of the same effect remains contentious.

[13] Throughout these agreements, the plaintiff successfully met the required targets set therein except for the years 2005 and 2015. No action was taken against the plaintiff for the 2005 shortfall due to the insignificance of the amount.

[14] Upon expiration of the 2013 agreement on 31 December 2015, the plaintiff continued providing editorial content and secured advertisements for the defendant pursuant to a month-to-month agreement until the parties executed and entered a new 2016 agreement, effective from 1 January 2016 to 15 September 2016, on 10 May 2016 and this agreement superseded the 2016 month-to-month agreement.

[15] On 13 January 2016, the defendant demanded payment of RM1,589,947.74 from the plaintiff for the alleged 2015 MGS shortfall under the 2013 agreement by issuing two contract surcharge invoices namely, B290167 and B290168 (also collectively referred to as the 'shortfall invoices') with the following details:

Shortfall category	Percentage shortfall (%)	Amount (RM)
CBT (B290168)	30.75%	1,257,375.64
AUTO (B290167)	22.41%	332,572.10
Total	–	1,589,947.74

[16] After the defendant had accepted all the plaintiff's invoices under the 2013 agreement and set off the same against the shortfall invoices, the defendant only owed the plaintiff the sum of RM60,514.43.

[17] A series of correspondence exchanges and meetings were held between the parties during which the matter was addressed:

(a) the defendant had informed the plaintiff vide a letter dated 6 January 2016 that as the plaintiff did not meet its obligations, no new agreement would be entered into for the next three years and parties entered into the 2016 month-to-month agreement. This arrangement was accepted and signed by the plaintiff on 18 January 2016 where the plaintiff's director and shareholder, Mr Yamin Vong ('PW1') had written the following at the acceptance note of the defendant's letter dated 6 January 2016:

> Dear Datuk Jalil,
>
> It is a privilege to work with the NST team and thank for your support last year. As we know, the circumstances were challenging and we were unable to meet our revenue obligations, the first time since 2003 ...

(b) a meeting was held on 19 January 2016 between the plaintiff and the defendant where PW1 had included the plaintiff's comments on the minutes where the following statement can be seen in the minutes of the meeting dated 19 January 2016:

> We humbly appeal for a compromise on the penalty in spirit of partnership that we built since 1998, view of the surpluses that we recorded yearly except last year, we appeal for a waiver of the penalty. On our part, we will waive the RM300,000 that has been outstanding to us between 2010–2013 contract.

(c) on 23 February 2016, PW1 sent an email to the defendant's then CFO to appeal for payment to be made to the plaintiff where it was admitted by the plaintiff as follows:

> We miss the minimum sum guaranteed in 2015 because the conditions in 2015 were unprecedented and circulation fell too much. We appeal to Datuk CEO and Datuk GME for a compromise and waiver due to our past 19 years where we have achieved and surpassed the targets.

(d) in a meeting held between the plaintiff and the defendant on 15 March

2016, the plaintiff through PW1 had appealed to pay off the sum of RM60,514.43 over six months via monthly payments of RM10,085.74 as evidenced from the minutes of the meeting on 15 March 2016. The defendant had consented to the plaintiff's request which resulted in the defendant issuing its letter dated 25 March 2016 to the plaintiff setting out the sum of RM10,085.74 to be paid by the plaintiff monthly from 15 March 2016 until 15 September 2016; and

(e) a meeting was held between the plaintiff and the defendant on 1 April 2016 where the plaintiff requested for the amount stipulated in the shortfall invoices to be waived as evidenced from the minutes of meeting on 1 April 2016.

[18] On 21 April 2016, the plaintiff pursued payment totaling RM1,199,874.72 from the defendant in respect of the commission invoices which comprised:

No	Category	Period	Invoice numbers
i	Payment for additional commission	2010–2013	IV-246/16
ii	Payment for outstanding commission	2015	SO1/02/15 IV-00072 IV-00087 IV-00102
iii	Payment for outstanding commission	2016	IV-205/16 and CN 00015 IV-213/16 IV-241/16

[19] The defendant does not deny the amount owing to the plaintiff but claims it is entitled to set off the amount premised on the plaintiff failure to fulfil its contractual obligation to achieve the MGS for the year 2015 and consequently to remit the required sum to the defendant in accordance to the agreed formula under cl 4 of the 2013 agreement.

[20] Following the parties' failure to amicably resolve their differences regarding the plaintiff's commission invoices claim and the defendant's contract surcharge invoices cross claim, the plaintiff initiated Kuala Lumpur High Court Suit No WA-22NCVC-268–05 of 2017 on 25 May 2017.

[21] The details of the plaintiff's claim are set out in para 87 of the statement of claim dated 23 May 2017 indorsed to the writ of summons dated 25 May 2017:

(a) a declaration that the contract surcharge invoices are null and void and unenforceable;

(b) a declaration that the 2013 shortfall clause amount to a penalty and thus, unenforceable;

(c) a declaration that there is a valid and binding 2016 September agreement between the plaintiff and defendant;

(d) a declaration that the defendant had wrongly repudiated the 2016 September agreement;

(e) the outstanding sum of RM1,408,050.32 due and owing to the plaintiff by the defendant as listed in para 86 of the plaintiff's statement of claim;

(f) loss of profit for June 2016 to September 2016 for the sum of RM439,441.62;

(g) special damages of RM197,373.30;

(h) general damages;

(i) interest on damages awarded at such rate as the court deems fit from the date of filing the statement of claim until full payment;

(j) costs on solicitor and client basis; and

(k) such other relief deemed fit by the court.

[22] The defendant's amended statement of defence and counterclaim dated 28 March 2019 set out the following cross claim in para 63:

(a) a declaration that the shortfall invoices have been validly issued;

(b) a declaration that the shortfall clause in 2013 agreement does not amount to penalty;

(c) a declaration that the plaintiff have the duty to fulfil the stipulated MGS in the 2013 agreement;

(d) a declaration that the 2016 agreement never materialised and therefore not valid and enforceable;

(e) a declaration that all copyright material including the domain names for CBT and AUTO belong to the defendant and, for the plaintiff to surrender any copyright materials under the plaintiff's possession and, the said domain names to the defendant within fourteen days from the date of the court judgment;

(f) the sum of RM57930.33 being the outstanding balance due and owing from the shortfall invoices;

(g) the sum of RM21,504,75 being the amount due for rental, management fee and utilities from January to May 2016;

(h) loss of profits of RM284,068 for CBT and RM75,000 for AUTO due to the plaintiff's use of lower advertisement rates than those provided in the 2010 and 2013 agreements;

A (i) damages to be assessed for the defendant's loss of advertisement revenue due to the plaintiff's conduct in providing cheap advertisement through their CBT and AUTO columns;

(j) general damages;

B (k) interest;

(l) costs on indemnity basis; and

(m) such other relief deemed fit by the court.

C ANTECEDENT PROCEEDINGS AND JUDGMENT BELOW

[23] If the defendant is entitled to set off the amounts it claims for the alleged non-fulfilment of the MGS, the plaintiff's claim will fail. Conversely, if the defendant is not entitled to do so, judgment for the undisputed amount D owing to the plaintiff ought to be entered against the defendant. This hinges on the question of whether the 2013 agreement provided for such a guarantee and if so, whether the plaintiff was under an absolute and unconditional obligation to fulfil the MGS.

E **[24]** The parties framed the agreed issues to be tried and submitted them for judicial determination before the High Court as follows:

(a) whether the MGS referred to in cll 4.3 and 4.5 of the 2013 agreement were soft targets and/or projections and not otherwise, having regard to F various matters including the wording in cl 4.3 of 'reasonable endeavour', other clauses in the 2013 agreement, the previous agreements entered into between the parties as well as the conduct of the parties?

(b) whether the MGS referred to in cll 4.3 and 4.5 of the 2013 agreement G amount to consideration on the part of the plaintiff under the 2013 agreement? In this regard, what were the considerations of the parties under the 2013 agreement?

(c) whether cl 4.5 of the 2013 agreement and/or the invoices issued by the H defendant to the plaintiff in 2016 are penal in nature and/or in breach of s 75 of the Contracts Act, having regard to the various clauses in the 2013 agreement, the previous agreements entered into between the parties as well as the conduct of the parties, and thus null and void, and unenforceable?

I (d) whether there was a final, conclusive and binding contract ('2016 September agreement') formed between defendant and the plaintiff in respect of the period from 1 January 2016 to 15 September 2016? If the answer is in the affirmative, whether the defendant repudiated the 2016 September agreement?

(e) whether the defendant is entitled to exercise a set off from Invoice No B290168 for the sum of RM1,257,375.64 and Invoice No B290167 for the sum of RM332.572.10 issued by the defendant, against the invoices issued by the plaintiff in 2015 and 2016?

(f) whether the defendant is entitled to claim from the defendant the reliefs sought in the counterclaim?

(g) whether the plaintiff is entitled to claim from the defendant the loss and damages as pleaded in the statement of claim?

[25] The plaintiff's primary case rests on a two-pronged argument. First, there is no provision in the 2013 agreement that requires the plaintiff to fulfil any minimum 'guarantee'. Second, even if there was such a provision, the defendant was only required to use 'reasonable endeavour' to fulfil the minimum 'guarantee' and, therefore, this was not an absolute or unconditional obligation but rather was a soft target.

[26] In addition to the surcharge invoices for the non-fulfilment of the alleged MGS for year 2015, the defendant also attempted to claim a further sum of RM403,287.86 for alleged non-fulfilment of what the defendant calls the prorated 2016 MGS. After the 2013 agreement expired on 31 December 2015, the defendant continued to appoint the plaintiff on a month-to-month arrangement on the same terms as the 2013 agreement pending negotiations on a new formal agreement. As this arrangement was based on the 2013 agreement, the plaintiff argued that the claim for non-fulfilment of the alleged MGS for the period of January to May 2016 could not succeed for the same reason stated above.

[27] The plaintiff also contended that its lower chargeable rate concession accorded to advertisers in the CBT and AUTO publications now pursued by the defendant in the suit were informed to the defendant who had acquiesced to the concession. All these contentions were denied by the defendant who resisted the claims relying on the 2013 agreement and conduct of both parties.

[28] The trial proceeded on 26 July 2019, 15 August 2019, 16 August 2019, 6 July 2020, 7 July 2020, 21 September 2020 and 25 September 2020. The plaintiff called four witnesses while the defendant called three witnesses. On 18 June 2021, after seven days of trial, the learned High Court judge dismissed the plaintiff's claim and allowed the defendant's counterclaim with costs of RM60,000.

[29] In essence, the main findings of the learned High Court judge may be summarised as follows:

A (a) the plaintiff's claim that the agreed MGS was merely a projection and soft target was legally unfounded, based on a plain reading of the MGS definition and cll 4.1, 4.2 and 4.5 of the 2013 agreement;

(b) prior to the 2013 agreement, there were three similar revenue sharing agreements under which the defendant imposed on the plaintiff the obligation to source customers for advertisements in the defendant's CBT and AUTO for which the plaintiff was paid a commission. No payment was required from the defendant for the plaintiff's services in the agreed ratio unless the plaintiff had successfully attained the MGS;

C (c) the plaintiff's obligation to fulfil the stated MGS constituted its primary legal obligation and the MGS had been an integral part of the parties' revenue sharing agreements since 2003. As the plaintiff had failed to attain the MGS and to remit the advertisement revenue, the defendant was found to have properly issued the shortfall invoices and was entitled to set them off against the plaintiff's claim;

(d) the shortfall invoices and MGS clauses were not punitive having been mutually agreed upon since the 2003 agreement. They were applied in each three-year term without objection or challenge from the plaintiff;

E (e) the defendant successfully refuted the plaintiff's claims of a binding September 2016 agreement and its alleged wrongful repudiation. No evidence supported the plaintiff's assertion that such an agreement existed;

F (f) the defendant suffered loss of profit as a consequence of the plaintiff's wrongful imposition of advertisement rates lower than those agreed upon by the parties in the 2013 agreement without the defendant's approval in contravention of cl 7.5 therein. The plaintiff had failed to respond to emails from the defendant's Head of the Classified Advertising Department ('DW2') dated 25 May 2015 and 22 June 2015 which queried the plaintiff's unilateral imposition of the lower advertisement rates; and

(g) the court took cognisance of the parties' long-established business relationship since 1998 and found no legitimate excuse for the plaintiff to justify its breach and non-compliance with the MGS, its liability for non-payment of the shortfall invoices and its unilateral imposition of advertisement rates lower than those prescribed.

I **[30]** The plaintiff took umbrage at the decision and on 30 June 2021 appealed to the Court of Appeal against the entire decision of the High Court.

[31] On 5 March 2024, the Court of Appeal allowed the plaintiff's appeal

and overturned the High Court's decision. The Court of Appeal ordered the defendant to pay the plaintiff the sum of RM1,178,369.97 together with interest at the rate of 5%pa from the date of filing the High Court suit until the date of full payment with costs of RM80,000.

[32] The main findings of the Court of Appeal may be summarised as follows:

(a) the dominant provision when read as a whole, contextually, is cl 4.3 which plainly provides that the plaintiff is only required to use reasonable endeavour to ensure that the 'MGS' is met. In other words, it does not amount to an unconditional and absolute undertaking or warranty on the part of the plaintiff to meet the 'MGS';

(b) even if the provisions in cll 1 and 4 of the 2013 agreement are ambiguous, they must nonetheless be read *contra proferentem* and construed against the defendant since the 2013 agreement was proffered by the defendant;

(c) the defendant has not led sufficient evidence to satisfy the court that the plaintiff did not use its reasonable endeavour required under cl 4.3 to find any liability on the part of the plaintiff in justification of its set off and counterclaim;

(d) the Court of Appeal considered appellate intervention justified by reason that the learned High Court judge seriously erred in finding liability against the plaintiff and that there was insufficient appreciation of the evidence because no consideration was given at all to cl 4.3 which was a non-direction tantamount to a fatal misdirection. Therefore, the Court of Appeal held that the plaintiff was not liable to the defendant for failure to meet the 'MGS' pursuant to the 2013 agreement; and

(e) in relation to whether the defendant knew and consented to the reduction in the advertisement rates particularly on the part of DW2, the Court of Appeal found that the learned High Court judge placed undue reliance on DW2's re-examination answers, which pertained to emails sent long after the advertisements had been placed. It held that these emails were an afterthought formulated as a defence against the plaintiff's claim and to support the defendant's counterclaim. In that context, appellate intervention was justified. Therefore, there was no basis for the defendant to counterclaim and succeed in general damages of RM100,000 as awarded by the learned High Court judge.

LEAVE QUESTIONS

[33] The defendant was granted leave to appeal to this court on the following questions of law:

A (a) question 1: whether a 'reasonable endeavours' cause can negate the consideration obligation as set out in s 10 (1) and 26 of the Contracts Act 1950?

(b) question 2: whether the effect of a 'reasonable endeavours' clause in any
B contract creates uncertainty and ambiguity by dissolving the rights, liabilities and obligations of the parties in the said contract considering s 30 and 71 of the Contracts Act 1950?

(c) question 3: in the event of an ambiguous and/or contradictory clause in
C a commercial contract, can the courts rewrite the transaction/contracts for the parties, considering the Contracts Act 1950 and established common law to the contrary?

(d) question 4: when there is ambiguity and/or contradiction in the terms of a contract, considering the past course of dealings between of the parties,
D whether *contra proferentum* rule takes precedence over other modes of construction or should it be used as the last resort having regard to the English Court of Appeal decision of *McGeown v Direct Travel Insurance* [2003] EWCA Civ 1606 and the Australian Federal Court decision of *470 St Kilda Road Pty Ltd v Robinson* (2013) 308 ALR 411?

E (e) question 5: whether the burden of proof to enable the reliance on a 'reasonable endeavours' clause in a contract lies on the obligor? and

(f) question 6: whether the principle of *generalia specialibus non derogant* is
F to be applied when construing a specific contractual obligation over a general 'reasonable endeavours' clause?

OUR ANALYSIS AND DECISION

The limits of appellate intervention

G

[34] Before proceeding further, we begin our discussion of this appeal by stressing the importance of the guidance this court has given on several occasions on appellate intervention. This court, as the final court of appeal,
H should be slow to interfere and ought not to reverse a trial judge's findings of fact, the judicial appreciation of evidence and exercise of discretion unless satisfied it is plainly wrong. The grounds on which an appellate court is entitled to interfere are, therefore, limited and it certainly could not interfere merely because it would have reached a different conclusion had it been hearing the
I case at first instance (*Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67 (FC); *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal* [2018] 2 MLJ 177 (FC); *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 (FC)).

[35] In the exercise of our appellate function, it is also pertinent for us to reiterate that this court may decline to answer the questions proffered in appropriate instances despite the fact that leave to appeal had been granted (*Tengku Dato Kamal Ibni Sir Sultan Abu Bakar Ors v Bursa Malaysia Securities Bhd* [2022] 3 MLJ 294, *Sabah Forest Industries Sdn Bhd v UNP Plywood Sdn Bhd* [2010] 1 MLJ 765 (FC), *Allied Capital Sdn Bhd v Mohd Latiff bin Shah Mohd, another application* [2005] 3 MLJ 1(FC)).

[36] With this, we now come to the crux of the matter.

Construction and implication of cll 4.1 and 4.2

[37] In the present appeal, it is plain from the facts and also from the records of appeal that:

(a) the parties had collaborated since 1998 and have had a long-standing course of dealing as evident from agreements executed on 18 June 2003, 21 March 2007, 3 October 2007 and 19 March 2010;

(b) the 2013 agreement was proffered by the defendant and superseded the earlier agreements made between the parties;

(c) the primary commercial purpose of the 2013 agreement was for the plaintiff to obtain advertisements and supply editorial content for the 'CBT' and 'AUTO' pullouts;

(d) the defendant did not enforce the minimal shortfall sustained in 2005 against the plaintiff due to the negligibility of the sum;

(e) in a letter dated 18 January 2016, PW1, the plaintiff's director and shareholder, responded to the defendant's letter dated 6 January 2016 acknowledging that the plaintiff was unable to meet its revenue obligation for the first time since 2003 ('letter dated 18 January 2016');

(f) the plaintiff, through PW1, made comments in the minutes of the meeting dated 19 January 2016, stating that it was appealing for a compromise and a waiver of the penalty for the shortfall. As a gesture of goodwill in exchange, the plaintiff was willing to waive the outstanding amount of RM300,000 owed to it under the 2010–2013 contract ('meeting minutes dated 19 January 2016');

(g) there was an email dated 23 February 2016 sent by PW1 to the defendant's then CFO in which it was admitted that the plaintiff had missed the minimum guaranteed sum in 2015 due to unprecedented conditions and a sharp decline in circulation. The plaintiff appealed for a compromise and waiver in light of its 19 year track record of meeting the targets ('email dated 23 February 2016');

(h) during the meeting on 15 March 2016, the plaintiff through

PW1 appealed to settle the RM60,514.43 shortfall owed to the defendant under the 2015 Invoices (after set off against the plaintiff's invoices under the 2013 agreement) via six monthly payments of RM10,085.74. The defendant consented leading to the issuance of the defendant's letter dated 25 March 2016, which set out a payment schedule requiring the plaintiff to pay RM10,085.74 monthly from 15 March 2016 to 15 September 2016 ('meeting minutes dated 15 March 2016' and 'letter dated 25 March 2016'); and

(i) a meeting was held on 1 April 2016, during which the plaintiff requested a waiver of the amount stipulated in the shortfall invoices. This request was recorded in the minutes of the meeting dated 1 April 2016 ('minutes meeting dated 1 April 2016').

In our considered view, the aforesaid are important background facts to bear in mind when one approaches the 2013 agreement for construction.

[38] This led us to the ultimate question in this appeal: whether there is an operative provision in the 2013 agreement for the minimum guaranteed sum ('MGS')?

[39] As our compass by which to steer, we take guidance from Lord Neuberger PSC's observation in *Arnold v Britton and others* [2015] UKSC 36 (SC) at p 1599:

> 15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 AC 1101, para 14. And it does so by focusing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. *That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions*. (Emphasis added.)

[40] Given their importance in the 2013 agreement, we reproduce cll 1 and 4 as well the letter of guarantee below for ease of reference:

> 1. Definitions And Interpretation
>
> In this agreement, unless the context otherwise requires, the following expressions shall have the following meanings:

'Net Advertising Revenue'	means	advertisement revenue from the sale of advertising spaces in CBT and AUTO which revenue shall exclude agency commission and government service tax incurred in relation thereto and one percent (1%) discount for early settlement.
'Minimum Guaranteed Sum'	means	the Net Advertising Revenue for each contract year guaranteed by ACSB to be received by NSTP as per Clauses 4.1 and 4.2 which sum shall exclude agency commission and government service tax incurred in relation thereto and the one percent (1%) discount for early settlement.
'Parties'	means	NSTP and ACSB and 'Party' means any one of them, as the context may require.
'Special Issues'	means	publications related to the motoring industry and which shall be published as and when mutually agreed by the Parties

...

4. The Contract Sum and Payment of Revenue

4.1 NSTP shall pay ACSB monthly the following percentage sum of the Net Advertising Revenue from advertisements appearing in CBT collected for the corresponding month:

Year 2013	:	Forty percent (40%) of Net Advertising Revenue for sales at a minimum of RM3,500,000.00 (RM3.5 Million) per annum.
		Fifty percent (50%) on every additional cent above RM4,000,000.00 (RM4 Million) per annum.
Year 2014	:	Forty percent (40%) of Net Advertising Revenue for sales at a minimum of RM3,675,000.00 (RM3.675 Million) per annum.
		Fifty percent (50%) on every additional cent above RM4,200,000.00 (RM4.2 Million) per annum.

Year 2015	:	Forty percent (40%) of Net Advertising Revenue for sales at a minimum of RM3,858,000.00 (RM3.858 Million) per annum.
		Fifty percent (50%) on every additional cent above RM4,400,001.00 (RM4.4 Million) per annum.

4.2 NSTP shall pay ACSB monthly the following percentage sum of the Net Advertising Revenue from advertisements appearing in AUTO collected for the corresponding month:

Year 2013–2015	:	Thirty Five percent (35%) of Net Advertising Revenue for sales at a minimum of RM1,400,000.00 (RM1.4 Million) per annum.
		Forty percent (40%) on every additional cent for sales between RM1,500,000.00 Million to RM2,000,000.00 per annum.
		Fifty percent (50%) on every additional cent above RM2,000,000.00 (RM2 Million) per annum.

4.3 ACSB shall use reasonable endeavour to ensure that the Minimum Guaranteed Sum as stipulated in Clause 4.1 and 4.2 is achieved within each contract year.

4.4 The Minimum Guaranteed Sum shall be reviewed at the end of each contract year.

4.5 NSTP shall review the Minimum Guaranteed Sum of sixty percent (60%) of the net advertising revenue for CBT and sixty five percent (65%) for AUTO, whichever is higher, at the end of each contract year. Should there be a shortfall in the minimum guarantee payment by ACSB, NSTP shall retain the right to withhold payments to ACSB of the following months until such underpaid amount is settled, and during the said period, ACSB shall undertake to procure to settle the underpaid amount within a period of thirty (30) days.

...

ANNEXURE 1

LETTER OF GUARANTEE

To: The New Straits Times Press (M) Berhad

Balai Berita

No 31,

Jalan Riong

59100 Kuala Lumpur

For and in consideration of you awarding to Aideah Communication Sdn Bhd (herein referred to as 'the Contractor'), a Contract for production of editorial publications known as 'BH AUTO' and its related special issues for BH and 'CARS BIKES TRUCKS' and it related special Issues for New Straits Times & New Sunday Times, I, Ahmad Yamin Vong Abdullah, NRIC No. XXXXXX-XX-XXXX of No.XXX, Jalan XXXXX XXXXX X/XX, 4XXXX Petaling Jaya, Selangor Darul Ehsan, being the director of the Contractor, do hereby guarantee to you the payment of any obligations of the Contractor arising out of the Contract from and after this date and I agree to bind myself to pay to you on demand, any sum which may become due to you by the Contractor whenever the Contractor shall pay the same.

It is understood and agreed that this shall be a continuing guarantee and indemnity for any such indebtedness as the Contractor shall contract with you.

IN WITNESS WHEREOF I have hereto set my hand this day of 2013.

IN THE PRESENCE OF } }
} XXXXXX
} .....

Name : YAMIN VONG
NRIC Number : XXXXXXXXXXXX

(The redactions are ours and they consist of national registration identification card number, address and signature)

[41] We pause to note that the defendant's cl 4.3 employs the term 'endeavour' in the singular, which, based on our familiarity with precedents and literature, is rather unusual as the common usage is in the plural. However, we wish to state that this imperfection bears no significance in light of how the defendant's leave questions were framed. Therefore, for the purpose of this appeal, we will treat 'reasonable endeavour' and 'reasonable endeavours' interchangeably.

[42] In addition to cll 1 and 4 above, we reproduce cl 14 of the 2013 agreement as follows:

14. Entire Agreement

This Agreement herein constitutes the entire Agreement in respect of the subject matter hereof between the parties hereto and supersedes all previous negotiations, commitments and writings, and may not be changed or modified in any manner, orally, or otherwise, except by an instrument in writing signed by duly authorised officers, or representations of each of the parties hereto.

[43] We note that the learned panel of the Court of Appeal relied on s 92 of the Evidence Act 1950 (Act 56) and cl 14 cited above as the basis to decline the

defendant's invitation to refer to the pre-2013 agreements for a better understanding of the parties' consensus on the MGS. The Court of Appeal considered that cl 14 is an entire agreement clause that overrides previous agreement between the parties. As against the parties, an entire agreement clause serves the purpose which is best captured by the words of Lightman J in *Inntrepreneur Pub Co v East Crown* [2000] 2 Lloyd's Rep 611:

> *The purpose of an entire agreement clause is to preclude a party to a written agreement from thrashing through the undergrowth and finding, in the course of negotiations, some (chance) remark or statement (often long-forgotten or difficult to recall or explain) upon which to found a claim, such as the present, to the existence of a collateral warranty.* The entire agreement clause obviates the occasion for any such search, and the peril to the contracting parties posed by the need that may arise in its absence to conduct such a search. *For such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that, accordingly, any promises or assurances made in the course of the negotiations (which, in the absence of such a clause, might have effect as a collateral warranty) shall have no contractual force, save in so far as they are reflected and given effect in that document.* The operation of the clause is not to render evidence of the collateral warranty inadmissible in evidence, as is suggested in *Chitty on Contract* (28th Ed) vol 1 para 12–102; it is to denude what would otherwise constitute a collateral warranty of legal effect. (Emphasis added.)

[44] However, in our view, cl 14 and s 92 of the Act 56 do not preclude us from referring to the pre-2013 agreements as these agreements serve as evidence of the objective factual background known to the parties and are reasonably available to them. Lord Hoffmann in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 (HL) on pp 912–913 propounded:

> The background was famously referred to by Lord Wilberforce as the 'matrix of fact,' but this phrase is, if anything, an understated description of what the background may include. *Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.* (Emphasis added.)

[45] It is also to be noted that this principle applies even if the contract under review is unambiguous. We consider it imperative to know the relevant circumstances which exist and are within the knowledge of the contracting parties at the time the contract was made. As Lord Wilberforce remarked in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) and Sanko Steamship Co* [1976] 1 WLR 989 (HL) on pp 995–996:

> *No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as 'the surrounding circumstances' but this phrase is imprecise: it can be illustrated but hardly*

defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating. (Emphasis added.)

[46] In the light of the above and for the reasons which will become apparent below, we reproduce the following clauses from the 2003 CBT agreement, 2007 CBT agreement, 2007 AUTO agreement and 2010 agreement (CBT and AUTO) respectively:

2003 CBT agreement:

9. Payment of Revenue

9.1 ACSB hereby *guarantees* a guaranteed revenue sum for each contract year as per Annexure Il and an annual minimum guarantee of at least 60% of the annual guaranteed revenue to NSTP. (Emphasis added.)

2007 CBT agreement:

9. Payment of Revenue

9.1 ACSB hereby *guarantees* the yearly Minimum Guaranteed Revenue sum of RM3,000,000.00 for year 2006/2007 and RM3,150,000.00 for year 2007/2008 and RM3,310,000.00 for year 2008/2009. (Emphasis added.)

2007 CBT agreement:

4. The Contract Sum and Payment of Revenue

...

4.2 ACSB hereby *guarantees* the yearly Minimum Guaranteed Revenue sum of RM1,500,000.00 for year 2007/2008, RM1,800,000.00 for year 2008/2009 and RM2,100,000.00 for year 2009/2010. (Emphasis added.)

2007 CBT agreement:

4. The Contract Sum and Payment of Revenue

...

4.4 ACSB hereby *guarantees* the yearly Minimum Guaranteed Revenue sum of RM1,000,000.00 for year 2010, 2011 and 2012 in relation to the publication of AUTO. (Emphasis added.)

[47] In our considered view, on the true construction of the clauses, bearing firmly in mind the commercial purpose of the 2013 agreement and context of this appeal, the answer must be that there is no specific operative provision in the 2013 agreement for MGS. Nowhere the phrase 'Minimum Guaranteed Sum' or 'guarantee' occur in cll 4.1 and 4.2. It is clear from a plain reading of cll 4.1. and 4.2 that there is no provision creating a liability on the part of the plaintiff to fulfil any specific amount to the defendant as an absolute and unconditional obligation under the 2013 agreement. Instead, cll 4.1 and

4.2 provide for the percentage of Net Advertising Revenue that the defendant is required to pay to the plaintiff. Our view is further fortified when we compare cll 4.1 and 4.2 read together with cl 14 of the 2013 agreement against other similar clauses in the pre-2013 agreements cited above which were drafted with an additional specification. The stark contrast is evidently visible.

[48] As we have seen in our jurisdiction, the contractual liability of a guarantor depends very much on the language of the instrument and the nature of the liability it creates (*The Pacific Bank Bhd (sued as guarantor) v Kerajaan Negeri Sarawak* [2014] 6 MLJ 153; [2015] 3 CLJ 717 (FC), *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Berhad* [1989] 3 MLJ 155 (SC)).

[49] With the reasonable endeavour clause under cl 4.3 of the 2013 agreement, it is our considered view that the thresholds set by cll 4.1 and 4.2 are merely soft target and projection to be fulfilled by the plaintiff based on the standard of reasonable endeavour.

[50] We were implored by learned counsel for the defendant to consider the plaintiff's acknowledgment in the letters dated 18 January 2016 and 25 March 2016, the email dated 23 February 2016 and the meeting minutes dated 19 January 2016, 1 April 2016 and 15 March 2016 which form the matrix of fact probative of the finding of MGS in favour of the defendant's proposed construction of cll 4.1 and 4.2. The same were also used to demonstrate that the plaintiff had admitted to its obligation under the alleged MGS. However, no authorities directly on point were relied upon to establish this point which, in any event, goes against rational principles and that, in our view, there are no ambiguities in the relevant clauses.

[51] Therefore, we decline to accept such contention. In our considered view, it is trite that parol evidence cannot be admitted to add to, vary or contradict a written contract. It follows logically from a conclusion that parties agreed to be bound by the written contract objectively interpreted. Lord Hobhouse of Woodborough in *Shogun Finance Ltd v Hudson* [2004] 1 AC 919 (HL) observed at p 944:

> *The rule that other evidence may not be adduced to contradict the provisions of a contract contained in a written document is fundamental to the mercantile law of this country; the bargain is the document; the certainty of the contract depends on it … this rule is one of the great strengths of English commercial law and is one of the main reasons for the international success of English law in preference to laxer systems which do not provide the same certainty*. (Emphasis added.)

[52] This rule is statutorily recognised by ss 91 and 92 of our Evidence Act 1950 (Act 56) and was applied by this court in numerous occasions (*Tindok*

Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229 (FC), *Tan Chong & Sons Motor Company (Sdn) Berhad v Alan McKnight* [1983] 1 MLJ 220 (FC), *Chase Perdana Bhd v Md Afendi bin Hamdan* [2009] 6 MLJ 783 (FC)).

[53] Conversely, the use of background information (surrounding circumstances which refer to facts known or that reasonably should have been known to both parties at or before the time of contracting) in contract interpretation does not violate this rule as such evidence aligns with the principles of finality and certainty. It functions as an interpretative aid to ascertain the meaning of the written words chosen by the parties rather than altering or overriding their meaning (*Sattva Capital Corp v Creston Moly Corp* [2014] SCJ No 53).

[54] In our considered view, the plaintiff's subsequent conduct, in the form of acknowledgment or affirmation in the said letter, email and meeting minutes cannot be used as extrinsic evidence to contradict cl 4.3 or to add the terms 'Minimum Guaranteed Sum' or 'guarantee' into cll 4.1 and 4.2. Neither can they be used to show the real intention of the parties regarding cll 4.1 and 4.2. Nor do we consider such conduct and documents arising long after contract formation to be an acceptable background as an interpretative aid to explain or introduce into cll 4.1 and 4.2 something that is not there. The House of Lords in *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583 (HL) ruled that a contract cannot be construed by reference to the subsequent conduct of the parties. On post-formation conduct, Viscount Dilhorne propounded at p 611:

> *I do not consider that one can properly have regard to the parties' conduct after the contract has been entered into when considering whether an inference can be drawn* as to their intention when they entered into the contract, though subsequent conduct by one party may give rise to an estoppel.
>
> *Their conduct at the time of entry into the contract may, however, be very relevant and regard can, I think, properly be had to that.* (Emphasis added.)

[55] Additionally, in the climate and context of a long-standing commercial partnership, we think judicial policy should require the court to exercise caution in drawing inferences from the conduct of an earnest businessman in the course of his trade except where such inferences align with commercial common sense and business efficacy. Lord Neuberger in his extra-judicial speech titled 'The Impact of Pre- and Post-Contractual Conduct on Contractual Interpretation' at the Banking and Finance Services Law Association (BFSLA) Conference in Queenstown on 11 August 2014 said:

> 14. *As for post-contractual actions, they rarely will be clear, and they will often be the subject of contradictory evidence and detailed explanation, which will require cross-examination*. And if it is known that post-contractual words and conduct are relevant, parties will incur effort time and cost in scurrying back to their lawyers to

A make sure that they can do or say what they are proposing without harming their interests. *So, too, self-serving statements from the parties will be unlikely to cast much light on the issue of what the contract means, and will similarly risk leading to long cross-examinations.*

B 15. I am not saying that such evidence will never be of any assistance. Of course it sometimes will be. *But we have to look 'across the piece' (sorry) at the general interests of parties, not just at a few individual cases, to decide what the law should be. Clarity and simplicity suggests that one should not let in the shed loads of evidence which changing the law would involve. And, for the reasons I have tried to give, the cost, time and effort involved in permitting all such evidence to be adduced is simply not worth it for the*
C *benefit of a few cases where it might make a difference*. (Emphasis added.)

Reasonable endeavour clause vis a vis ss 10(1), 26, 30 and 71 of the Contracts Act 1950 (Act 136)

D **[56]** We now turn our attention to the following questions before us:

Question 1:Whether a 'reasonable endeavours' clause can negate the consideration obligation as set out in ss 10(1) and 26 of the Contracts Act 1950?

E Question 2:Whether the effect of a 'reasonable endeavours' clause in any contract creates uncertainty and ambiguity by dissolving the rights, liabilities and obligations of the parties in the said contract considering ss 30 and 71 of the Contracts Act 1950?

F **[57]** It was submitted for the defendant that the common use of endeavours clauses incorporating phrases such as 'best endeavours' and 'reasonable endeavours' has made them a standard clause.

G **[58]** However, with the existence of the said clauses, learned counsel for the defendant argued, the practical effect of the Court of Appeal's decision negated the plaintiff's obligation to provide consideration under the 2013 agreement as required under ss 10(1) and 26 of the Contracts Act 1950 by treating such consideration obligation as a mere soft target rather than an absolute
H undertaking, thereby rendering obligations indefinite and potentially dissolving parties' clear rights and liabilities under ss 30 and 71 of the Contracts Act 1950.

I **[59]** It follows that the plaintiff 'can sit back and do nothing' yet would still receive payment from the defendant even though, as an exchange under the 2013 agreement, the defendant had provided its prime advertising space in its newspapers to the plaintiff at no cost and bore the production costs of the same.

[60] Great emphasis was placed by learned counsel for the defendant on the argument that the purported MGS requirement to be met constitutes the plaintiff's very consideration under the 2013 agreement, having due regard to: (a) the plaintiff's consistent historical achievement in meeting the yearly increasing targets over the past 12 years (save for the years 2005 and 2015); (b) the time spent negotiating a new and higher number of MGS which was agreed upon between the parties every triennial when entering into a new agreement; (c) the specific reference to the words 'guaranteed by ACSB' in cl 1, where the term MGS is defined; and (d) the mechanism provided under cl 4.5 which comes into operation if the purported MGS is not met.

[61] With respect, we are not convinced. In construing commercial contract such as the 2013 agreement harmoniously as implored by the defendant, we cannot overlook cl 4.3 which was deliberately incorporated by the defendant and then construe cll 4.1 and 4.2 as having the effect of an absolute or unconditional undertaking or warranty.

[62] Nor do we accept the defendant's contention that giving effect to reasonable endeavour clauses would introduce uncertainty into contractual relationships by making obligations indefinite and potentially undermining the clear rights and liabilities established under the Contracts Act 1950.

[63] Indeed, a contract drafted entirely from scratch without incorporating any standard or boilerplate terms is a rare beast. However, we see no reason to treat standard or boilerplate provisions differently or assign them less weight than provisions specifically negotiated and tailored by the parties, especially in our present case, where cl 4.3 expressly makes specific reference to cll 4.1 and 4.2.

[64] In our approach to our consideration of these clauses, we are guided by the observation of Lord Steyn in *Sirius International Insurance Co (Publ) v FAI General Insurance Ltd and others* [2004] 1 WLR 3251 (HL) who propounded at p 3257:

> ... The aim of the inquiry is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. *The inquiry is objective: the question is what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of specific language. The answer to that question is to be gathered from the text under consideration and its relevant contextual scene.* (Emphasis added.)

[65] Further, Lord Neuberger in *Marley v Rawlings and another* [2014] 1 All ER 807 (SC) observed at p 815:

> 19. When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words,

(a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party's intentions. (Emphasis added.)

[66] The High Court of Australia in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd and Others* (2004) 211 ALR 342 (HC) succinctly put the principles on pp 351–352 as follows:

[40] This court, in *Pacific Carriers Ltd v BNP Paribas* (2004) 208 ALR 213, has recently reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are determined. *It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement*. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction. (Emphasis added.)

[67] The plaintiff asserts that the purported MGS particularly under cll 4.1 and 4.2 is merely a soft target and a projection whereas the defendant contends that these clauses constitute a guaranteed obligation. However, contractual relations are not determined by the subjective beliefs of the parties regarding their rights and liabilities. Instead, references to the common intention of the contracting parties must be understood in terms of how a reasonable person would interpret the language used in the 2013 agreement. In other words, the contract must speak for itself.

[68] So much so that, in the ordinary course of events, extrinsic evidence is inadmissible and cannot be relied upon to show the real intention of the contracting parties. Lord Hutton in *AIB Group (UK) Ltd v Martin and another* [2002] 1 WLR 94 (HL) observed on pp 95–96:

[4] I would add one further observation. *It is a general rule in the construction of deeds that the intention of the parties is to be ascertained from the words used in the deed and that, with certain limited exceptions, extrinsic evidence cannot be given to show the real intention of the parties. On occasions this rule may lead to the actual intention of the parties being defeated but the rule is applied to ensure certainty in legal affairs*. (Emphasis added.)

[69] Our task is to ascertain the intentions of the parties as expressed in the language in which they have chosen to draft the 2013 agreement. Where the phrases and provisions in a commercial contract are open to different

constructions, the court favours a commercially sensible construction which yields a reasonable result as that is likely to be what reasonable businesspeople would intend, having regards to not only of the text but also its factual context and purpose. This is rather different from listening to the parties' version of what they each meant.

[70] The promotion of certainty through an objective approach to contract interpretation was amplified by Lord Goff of Chieveley in *India (President of) v Jebsens (UK) Ltd, The General Capinpin, Proteus, Free Wave and Dinara* [1991] 1 Lloyd's Rep 1 (HL) where His Lordship enunciated:

> I must confess I am reluctant to speculate on the motives of a party for adopting a clause in any particular form. *For once a clause is embodied in a commercial contract, it has simply to be construed in its context, from the objective point of view of reasonable persons in the shoes of the contracting parties. Of course it has to be construed sensibly, and regard has to be had to its practical effect. But the objective interpretation is of paramount importance in commercial affairs; commercial men have frequently to take important decisions with some speed, and it is of great importance that they all know that they can rely on Courts and arbitrators, if any dispute should later arise, to adopt the same objective approach as they themselves have to adopt in the daily administration of their contracts.* (Emphasis added.)

[71] Such an approach to interpretation which focuses on the language used by the parties was duly observed by the learned panel of the Court of Appeal where cll 4.1, 4.2 and 4.3 were construed in their context.

[72] Therefore, bearing in mind that the interpretation of a contract is an objective exercise, it is our considered view that any reasonable man would have understood that, by its plain and ordinary meaning, the operation of cll 4.1 and 4.2 is guided by the standard of 'reasonable endeavour' as set out under cl 4.3.

[73] Viewed as a whole, the defendant's proposed version of construction that cll 4.1 and 4.2 read together with cll 1 and 4.5 as well as the letter of guarantee in Annexure 1 of the 2013 agreement would yield the finding of an unconditional or absolute undertaking or warranty is untenable and not supported by an objective and textualist approach to contract interpretation.

[74] To our minds, the defendant cannot selectively patch together certain clauses that support its version of construction while disregarding those that contradict its stance and then insist that this constitutes the harmonious interpretation the court must adopt. The interplay and how cll 1, 4.1, 4.2, 4.5 and the letter of guarantee in Annexure 1 can be reconciled and operate alongside cl 4.3 remains unexplained, leaving a gap in the defendant's entire submissions. There is no reason to read cll 4.1 and 4.2 as prescribing a

guaranteed obligation. Such a finding would simply go against the text and design of the parties' agreement and render cl 4.3 otiose.

[75] Reading the 2013 agreement while omitting cl 4.3, as if it were entirely removed, would reduce the clause to mere cosmetic existence especially when the clause is not inconsistent with the main purpose of the contract. Lord Halsbury LC in *Glynn v Margetson & Co* [1893] AC 351 (HL) observed at p 357:

> Looking at the whole of the instrument, and seeing what one must regard ... as its main purpose, one must reject words, indeed whole provisions, *if they are inconsistent with what one assumes to be the main purpose of the contract.* (Emphasis added.)

[76] In our considered view, it is fair to assume that parties must be taken to have read and understood what they were signing up for. In every commercial contract, all terms and expressions must be regarded as having been inserted for a purpose. We must give the clauses under review a commercially sensible construction bearing in mind that the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language (*Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 (HL)). We consider that the approach we took in interpreting cll 4.1, 4.2 and 4.3 is more reflective of a commercially sensible construction and business common sense as implored by the plaintiff than the alternative proffered by the defendant.

[77] Further, we would venture to add that courts, here and elsewhere, have dedicatedly developed jurisprudence on the phrases 'best endeavours' and 'reasonable endeavours' in commercial contracts with varying legal implications and significance which evidences, time and again, the importance of careful drafting (see, for instance, Singapore: *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] SGCA 16 (CA); New Zealand: *Mana v Fleming* [2007] NZCA 324 (CA); Australia: *Transfield Pty Ltd v Arlo International Ltd* (1980) 144 CLR 83 (HC), *Hospital Products Ltd v United States Surgical Corp (Hospital Products/Surgical Staples case)* (1984) 156 CLR 41 (HC) and *Electricity Generation Corporation (t/as Verve Energy) v Woodside Energy Ltd* [2014] HCA 7 (HC)).

[78] So much so that these phrases, or its variations, have been incorporated in sophisticated initiatives with elaborated guidance as to their concept and operation (see, for instance, article 5.1.4 of the UNIDROIT Principles of International Commercial Contracts 2016 and ss 2–306 of the Uniform Commercial Code).

[79] Therefore, the phrase 'reasonable endeavour' is not merely generic English words of common usage in standard clause but an enforceable contract term that extends beyond a cosmetic existence carrying important legal implications and serving as a criterion for evaluating correct contractual performance. To say otherwise would fly in the face of both the overtones and undertones of the authorities cited above.

[80] In relation to what amounts to valid contractual consideration for a service undertaking to put forth reasonable endeavours to provide the necessary editorial content and secure advertisements such as this, for a start, we are mindful of the observation made by Lord Denning MR in *Greaves & Co (Contractors) Ltd v Baynham Meikle and Partners* [1975] 3 All ER 99 (CA) on pp 103–104:

> *Apply this to the employment of a professional man. The law does not usually imply a warranty that he will achieve the desired result, but only a term that he will use reasonable care and skill. The surgeon does not warrant that he will cure the patient. Nor does the solicitor warrant that he will win the case. But, when a dentist agrees to make a set of false teeth for a patient, there is an implied warranty that they will fit his gums*. (Emphasis added.)

[81] Hugh Beale, Bénédicte Fauvarque-Cosson, Jacobien Rutgers and Stefan Vogenauer in their work, *Cases, Materials and Text on Contract Law* (2019) (3rd Ed) Bloomsbury Publishing at p 776 succinctly observed the position of the law as follows:

> *In English law, (1) if the obligation is one to use reasonable care and skill, there will be no liability unless a failure to use care and skill is shown; (2) if liability is strict, the debtor will be liable if the result promised has not been achieved, unless the debtor can prove discharge by frustration; and (3) there are certain types of obligation to which the doctrine of frustration seems not to apply, so that in effect liability is absolute*. (Emphasis added.)

[82] At this juncture, it will suffice for us to say that the evaluation of non-performance of this kind of obligation is based on a comparison with the endeavour a reasonable person of the same kind would have made in similar circumstances. Non-performance is, thus, proved by the lack of care on the part of the promisor which is an objective standard of diligence. The reasonableness standard is used to determine the scope of an obligation of reasonable endeavour.

[83] Further, courts have adopted a holistic and flexible approach rather than an overly technical reading of the requirement of consideration which might otherwise prevent the finding of a valid contract. For instance, VK Rajah JC in the Singapore High Court case of *Chwee Kin Keong and Others v Digilandmall.com Pte Ltd* [2005] 2 LRC 28 enunciated on pp 66–67:

> *The modern approach in contract law requires very little to find the existence of consideration. Indeed, in difficult cases, the courts in several common law jurisdictions have gone to extraordinary lengths to conjure up consideration … Indeed, the time may have come for the common law to shed the pretence of searching for consideration to uphold commercial contracts. The marrow of contractual relationships should be the parties' intention to create a legal relationship*. (Emphasis added.)

[84] In *Williams v Roffey Bros and Nicholls (Contractors) Ltd* [1990] 1 All ER 512, the English Court of Appeal had applied the practical benefits test recognising the potential avoidance of the liquidated damages clause as sufficient consideration. The court was guided more by commercial utility than by technical questions of consideration. Russell LJ enunciated at p 524:

> In the late twentieth century I do not believe that the rigid approach to the concept of consideration to be found in *Stilk v Myrick* is either necessary or desirable. *Consideration there must still be but in my judgment the courts nowadays should be more ready to find its existence so as to reflect the intention of the parties to the contract where the bargaining powers are not unequal and where the finding of consideration reflects the true intention of the parties.* (Emphasis added.)

[85] Bearing in mind the modern approach and practical benefits analysis from the above cases, we now move on to examine what is the plaintiff's consideration under the 2013 agreement. The recital of the 2013 agreement, insofar as it is relevant, provides:

> *WHEREAS*:
>
> A. ...
>
> B. ...
>
> C. ...
>
> D. NSTP is desirous of awarding a contract to ACSB to operate, manage and produce CBT, and AUTO and to develop the same, as well as securing advertisements for CBT and AUTO upon the terms and conditions set herein.
>
> E. *ACSB is desirous of providing the services upon the terms and conditions set out under Clause 5 hereinafter*. (Emphasis added.)

[86] Clause 2 further provides as follows:

> 2. *Consideration*
>
> *In consideration of ACSB providing the services as more particularly described in Clause 5 hereof within the period stipulated in Clause 3*, NSTP hereby agrees to pay to ACSB a sum referred to in Clause 4 below (hereinafter referred to as the 'Contract Sum'). (Emphasis added.)

[87] Clause 5 then provides:

> 5. *The Services*

During the Term of this Agreement, ACSB shall provide to NSTP, the services (the 'Services') as follows:

(a) writing, editing and producing in printed form, minimum of sixteen (16) tabloid pages of CBT and eight (8) for AUTO and 'Special Issues' for with pagination to be determined as and when such issues are to be published;

(b) co-ordinating the motoring section referred to in Clause 5(a) above with person assigned and/or designated by the Group Editor, NSTP and/or as the Group Editor deputises;

(c) writing and sourcing related articles for 'Special Issues' and anything which NSTP and ACSB finds beneficial to publish;

(d) providing any other related editorial write-ups on the motoring industry as I agreed upon with NSTP from time to time;

(e) maintaining regular liaison with advertisers and advertising agencies in the motoring industry;

(f) liaising with motorsport organisers for purposes of obtaining advertising support;

(g) to undertake and carry out advertising sales for CBT and AUTO Inclusive of various sub-headings; and

(h) supporting and sourcing advertising sales for the motoring articles. (Emphasis added.)

[88] There is also, in our view quite crucially, in addition to cl 4.3, cl 7.3 which the Court of Appeal and the High Court may have missed where the phrase 'reasonable endeavour' was also consistently employed. Clause 7.3 provides:

7. *Obligation of ACSB*

7.1 ...

7.2 ...

7.3 ACSB shall use *reasonable endeavour* to assist NSTP in procuring advertisement relating to motoring in the *Berita Harian, BH Ahad, New Straits Times, New Sunday Times*.

... (Emphasis added.)

[89] We agree with learned counsel for the plaintiff that the primary commercial purpose of the 2013 agreement was for the plaintiff to obtain advertisements and supply editorial content for the 'CBT' and 'AUTO' pullouts. This responsibility required the plaintiff to engage with third parties to secure advertisements, a process inherently shaped by market conditions, third-party cooperation and other external factors beyond the plaintiff's control.

[90] Therefore, learned counsel argued and we agree, in recognition of these challenges, the inclusion of a 'reasonable endeavours' clause provided a pragmatic and commercially sensible approach aligning the plaintiff's obligations with the unpredictable dynamics of the advertising industry. It follows that the 'reasonable endeavours' clause functions as a soft target establishing a practical benchmark for the plaintiff's performance that reflects the parties' intentions at the time the 2013 agreement was executed.

[91] As alluded to above, the omission of MGS in cll 4.1 and 4.2 along with the factual context reinforces a shared understanding that the plaintiff's obligations were to be assessed based on a reasonable and adaptable standard rather than a rigid financial commitment.

[92] Having undergone and perused the voluminous appeal records, we also notice that the plaintiff had secured advertisements and provided editorial content for the 'CBT' and 'AUTO' pullouts during the currency of the 2013 agreement. Naturally, much time, labour, costs and expenses have been incurred by the plaintiff in the process. Further, there is no contention that the plaintiff had failed to fulfil its obligation to exercise 'reasonable endeavours' in securing advertisements and delivering editorial content for the publications.

[93] For completeness, we wish to reiterate the established principle that the law requires the presene of consideration in a valid contract and that consideration need not be adequate. This court, in many occasions, had echoed this principle.

[94] Peh Swee Chin FCJ in *Tan Chiw Thoo v Tee Kim Kuay* [1997] 2 MLJ 221 (FC) observed at p 232:

> It must be remembered that 'sufficiency' of consideration is different, in law, from the 'adequacy' of consideration, though any dictionary may show both words to bear the same meaning. *In law, the courts will often enquire into the 'sufficiency' but not the 'adequacy' of consideration, 'sufficiency' in law is synonymous with 'validity' in regard to consideration*. (Emphasis added.)

[95] To the like effect, Gill FCJ in *Guthrie Waugh Bhd v Malaiappan Muthuchumaru* [1972] 2 MLJ 62 (FC) mentioned at p 66:

> *It is trite law that the court is not concerned with the inadequacy of consideration.* (Emphasis added.)

[96] Therefore, with respect, the defendant's contention that a 'reasonable endeavour' clause negates the plaintiff's consideration obligation under the 2013 agreement contrary to ss 10(1) and 26 of the Contracts Act 1950 is without merit. Further, since courts employ an objective approach to contract

interpretation, as the Court of Appeal did, giving effect to reasonable endeavour clauses would not introduce uncertainty into contractual relationships by making obligations indefinite and potentially undermining parties' rights and liabilities contrary to ss 30 and 71 of the Contracts Act 1950 as contended by the defendant.

[97] With respect, taken in their entirety, questions 1 and 2 if read literally are non-starter and should be laid to rest. Therefore, we are of the considered view that questions 1 and 2 must be answered in the *NEGATIVE*.

Contra proferentem rule and judicial rewriting of commercial contracts

[98] In the same fashion, we now deal with the following questions together:

Question 3: In the event of an ambiguous and/or contradictory clause in a commercial contract, can the courts rewrite the transaction/contracts for the parties, considering the Contracts Act 1950 and established common law to the contrary?

Question 4: When there is ambiguity and/or contradiction in the terms of a contract, considering the past course of dealings between of the parties, whether contra proferentum rule takes precedence over other modes of construction or should it be used as the last resort having regard to the English Court of Appeal decision of *McGeown v Direct Travel Insurance* [2003] EWCA Civ 1606 and the Australian Federal Court decision of *470 St Kilda Road Pty Ltd v Robinson* (2013) 308 ALR 411?

[99] Quoting para 35 of the Court of Appeal's grounds of judgement, it was argued for the defendant that the Court of Appeal had erred in law and ought to have only applied the *contra proferentem* rule as a last resort after first exhausting other methods of interpreting the intention of the parties and only if there was a genuine ambiguity.

[100] For ease of reference, we reproduce the relevant para:

> [35] In any event and even if the provisions in cll 1 and 4 of the 2013 agreement are ambiguous, they must nonetheless be read contra proferentum and construed against the respondent since the 2013 agreement was proffered by the respondent following *Malaysian Motor Insurance Pool v Tirumeniyar a/l Singara Veloo* [2020] 1 MLJ 440; [2019] 10 CLJ 731 (FC). (Emphasis added.)

[101] Upon our perusal, para 35 is not without qualification. The phrase 'even if the provisions in cll 1 and 4 of the 2013 agreement are ambiguous' shows that the learned panel of the Court of Appeal had directed itself to a consideration that the rule should apply if there is an ambiguity. However, we fail to see how para 35 is ambiguous to the defendant.

[102] In *McGeown v Direct Travel Insurance* [2004] 1 All ER (Comm) 609 (CA), Auld LJ propounded at p 615:

> [13] In my view, *the judge erred in his exercise of construction in two respects. The first was in the route of his reasoning, taking as his starting point the conclusion that the words of the second limb of s 6.3, 'all your usual activities', looked at on their own, were ambiguous, and then applying the contra proferentem rule in favour of the claim unless ousted by a purposive and/or contextual analysis*. A court should be wary of starting its analysis by finding an ambiguity by reference to the words in question looked at on their own. And it should not, in any event, on such a finding, move straight to the contra proferentem rule without first looking at the context and, where appropriate, permissible aids to identifying the purpose of the commercial document of which the words form part. Too early recourse to the contra proferentem rule runs the danger of 'creating' an ambiguity where there is none ... (Emphasis added.)

[103] In the Australia Federal Court's case of *470 St Kilda Road Pty Ltd v Robinson* (2013) 308 ALR 411, Kenny J opined at p 426:

> [68] *In the interpretation of an exclusion clause in an insurance contract, the contra proferentem rule operates only where the words in the clause are ambiguous. According to many authorities, the rule is one 'of last resort',* in the sense that there remains ambiguity after the application of the other relevant principles of construction. (Emphasis added.)

[104] We now dissect the preceding paras of the Court of Appeal's grounds of judgment before para 35 and compare them to the one referenced by Auld LJ in *Direct Travel Insurance*. The learned panel of the Court of Appeal was mindful of the fundamental approach to interpreting commercial contracts as evident from para 28:

> [28] In the circumstances, the 2013 agreement must be *construed as a whole within its four corners that reasonably reflects business common sense*. (Emphasis added.)

[105] On the strength of the authorities in *Heisler v Anglo-Dal Ld* [1954] 1 WLR 1273, *The Pacific Bank Bhd (sued as guarantor) v Kerajaan Negeri Sarawak* [2013] MLJU 1564; [2015] 3 CLJ 717 (FC) and *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Berhad* [1989] 3 MLJ 155 (FC), the learned panel moved on to say at para 32:

> [32] *We have carefully read and considered the wordings in cll 1 and 4 of the 2013 agreement.* The dominant provision *when read as a whole contextually* is cl 4.3 which plainly provides that the appellant is only required to use reasonable endeavour to ensure that the MGS is met. In other words, it is not an unconditional and absolute undertaking or warranty on the part of the appellant to meet the MGS. (Emphasis added.)

[106] Further authorities were cited to fortify their findings where the learned panel of the Court of Appeal at para 33 remarked:

[33] *We are fortified* by the views of Vernon Ong Lam Kiat JCA (later FCJ) in *Perbadanan Kemajuan Negeri Selangor v Selangor Country Club Sdn Bhd* [2017] 2 MLJ 819 (CA) as follows with emphasis added by us:

...

See also *Perwaja Terengganu Sdn Bhd v Maju Holdings Sdn Bhd* [2019] MLJU 728; [2019] 1 LNS 1061. (Emphasis added.)

[107] For better visualisation, the learned panel of the Court of Appeal then cited the English case of *Rhodia International Holdings Ltd and another v Huntsman International LLC* [2007] All ER (D) 264 (Feb) to illustrate the dichotomy between the phrases 'reasonable endeavour' and 'best endeavour' in drafting practice and the judicial treatment as seen in para 34:

[34] *We also observed that an obligation to use reasonable endeavour is less stringent than to use best endeavour as held in Rhodia International Holdings Ltd and another v Huntsman International LLC* [2007] All ER (D) 264 (Feb). According to the appellant, it is merely a soft target to be met. (Emphasis added.)

[108] In our view, ample analysis and appreciation of the law and relevant rules of contract interpretation were made prior to the learned panel of the Court of Appeal's comment in para 35. Viewed in the context of Auld LJ in *Direct Travel Insurance*, the Court of Appeal's grounds of judgment, by comparison, do not fall within the category of error so described. The learned panel of the Court of Appeal did not hastily invoke the *contra proferentem* rule as the primary solution. In fact, the panel was cautious about its applicability in the first place as evidenced by the qualified 'if'.

[109] In addition, we wish to address that the case *Malaysian Motor Insurance Pool v Tirumeniyar a/l Singara Veloo* [2020] 1 MLJ 440; [2019] 10 CLJ 731 cited by the learned panel Court of Appeal at the end of para 35 had clearly reiterated the underlying principles of *contra proferentem* rule quite similar to the observations of Auld LJ in *Direct Travel Insurance*. Therefore, we are of the considered view that the learned panel of the Court of Appeal was mindful of the contours of the *contra proferentem* rule. Alizatul Khair FCJ delivering the judgment of this court in that case opined on pp 762–763:

[98] Coming to the contra proferentum rule, it provides that *where a term is ambiguous*such ambiguity ought to be construed against the party who prepared it.

...

[102] Arguably, this case *may even be resolved without resort to the contra proferentum rule* ... (Emphasis added.)

[110] We also wish to add that there are no ambiguities or inconsistencies in the terms or clauses in the 2013 agreement nor was this the finding of the Court of Appeal. Therefore, we hold that the defendant's contention is without merit

and we *DECLINE TO ANSWER* question 4 as it does not have any impact on the outcome of this appeal.

[111] Similarly, we also *DECLINE TO ANSWER* question 3 as it is simply irrelevant in the context of the present appeal. The question assumes that the 2013 agreement is ambiguous. However, having reviewed the Court of Appeal's grounds of judgment, we are of the considered view that it was not the decision of the Court of Appeal that the 2013 agreement ought to be rewritten. A judicial remark suggesting that the *contra proferentem* rule may apply cannot be equated to a judicial rewriting or reformation of the 2013 agreement.

Reasonable endeavour clause and the applicable burden and onus of proof

[112] The next question we must consider is this:

Question 5: Whether the burden of proof to enable the reliance on a 'reasonable endeavours' clause in a contract lies on the obligor?

[113] Learned counsel for the defendant submitted that the Court of Appeal had erred in law and in fact in failing to consider the law that sets out the burden of proof to enable reliance on the reasonable endeavour clause lies with the plaintiff as the obligor and not the defendant as the obligee.

[114] The Court of Appeal, they submitted, has shifted the burden to the defendant to lead evidence to demonstrate that the reliance on the clause is justified rather than the burden to do so to be borne by the plaintiff. It was also submitted for the defendant that the plaintiff had failed to lead any supporting evidence that they had utilised reasonable endeavour to satisfy the MGS.

[115] To support such contention, learned counsel for the defendant cited paras 142 and 143 of the Court of Appeal's grounds of judgment in *Kumpulan Prasarana Rakyat Johor Sdn Bhd v Emercon Bina Sdn Bhd and another appeal* [2021] 1 MLJ 629 as follows:

> *[142] In both situations, the plaintiff, the PTG and UPEN had pointed out certain steps which the defendant could have taken to procure the approval of the application to surrender and re-alienation of the project land. The burden thus ordinarily shifts to the defendant to show that they had took those steps, or that those steps were not reasonably required, or that those step would have been bound to fail* (see *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] SGCA 16; [2014] 2 SLR 905).
>
> [143] In our view, the positive and reasonable steps the defendant should have taken to procure the surrender and re-alienation of the project land, was to appeal to the MB or to meet up with Johor Corp as suggested by UPEN. By refusing to do one or the other, the defendant cannot claim that they had fulfilled the duty and obligation required of them. (Emphasis added.)

[116] Learned counsel for the defendant also relied on the Singapore Court of Appeal case of *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] SGCA 16; [2014] 2 SLR 905 (CA) and cited paras 91–93 of the judgment as follows:

> [91] The last case which we wish to discuss in relation to the operation and extent of 'all reasonable endeavours' obligations is EDI (also referred to earlier at [59] above). We think there is merit in Lord Glennie's view that it may well be part of an *'all reasonable endeavours' obligation for the obligor to inform the obligee of any difficulties it is encountering so as to ascertain whether the obligee has a possible solution* (at [21]):
>
> > *... Lloyd LJ ... emphasises [in Yewbelle (CA) at [105]] that it may well be part of the obligation to use all reasonable endeavours for the party on whom the obligation is placed to inform the other party of any difficulties he is encountering and, in an appropriate case, to see whether that party has a possible solution to the problem. That must be right. A party cannot just sit back and say that he could not reasonably have done more* when, if it had had asked the other party to the transaction, it might have discovered that there were other steps which could reasonably have been taken. But all will depend upon the circumstances. (Emphasis added.)
>
> We should point out here that it is not an ironclad rule that the obligor under an 'all reasonable endeavours' obligation must always inform the obligee of any difficulties it is encountering so as to see whether the latter has any possible solution. Rather, whether the obligor has informed the obligee in this regard is a matter that the court may (depending on the circumstances) take into consideration in determining whether the obligor has satisfied its 'all reasonable endeavours' obligation.
>
> [92] *On the issue of the burden of proof, we also generally agree with Lord Glennie that* (at [22]):
>
> > *... NCP [the obligee] led at proof. This was because they accepted that the burden was on them to show that EDI [the obligor] were in breach, so as to give a basis for the mutuality argument. But it does not seem to me that the burden necessarily remains throughout on NCP. My tentative view is that if NCP can point to steps which could have been taken, by evidence (or possibly by pleading), the evidential burden may shift to EDI to show, as the case may be, that they took those steps, that they could not reasonably have been expected to take them or that such steps would have been bound to fail.* It is EDI who are likely to have the evidence on these points and, once a sufficient case has been raised by NCP, the burden must ultimately be on EDI to establish that they used all reasonable endeavours as required by the agreement: c f [*Mactaggart & Mickel Homes Ltd v Hunter* [2010] CSOH 130] at para 58 in which Lord Hodge refers to the onus of proof being on the party asserting that he has used reasonable endeavours. However, the point was not argued before me and, in the conclusions I have reached, it makes no difference to the outcome. (Emphasis added.)
>
> *In this regard, we go further than Lord Glennie in that we are of the view that once the obligee points to certain steps which the obligor could have taken to procure the contractually-stipulated outcome, the burden ordinarily shifts to the obligor to show that it took those steps, or that those steps were not reasonably required, or that those steps would have been bound to fail.*

A Summary of the guidelines applicable to 'all reasonable endeavours' and 'best endeavours' clauses

[93] The foregoing cases are the more significant cases to have originated from the English and Scottish courts on 'all reasonable endeavours' clauses and 'best endeavours' clauses. The available commentaries in this area of the law (and these B tend to be professional rather than academic) tend to agree that there is a great deal of uncertainty surrounding the obligations imposed by the various 'endeavours' clauses. The typical advice in these commentaries is for the parties to expressly specify the criteria by which satisfaction of such clauses is to be assessed. This lack of certainty is unfortunate. Be that as it may, following on our holding (at [62] above) C that the test for determining whether an 'all reasonable endeavours' obligation has been satisfied should ordinarily be the same as the test for determining whether a 'best endeavours' obligation has been satisfied (ie, the *Travista* test), we also endorse the guidelines below vis a vis the operation and extent of both 'all reasonable endeavours' and 'best endeavours' clauses:

D (a) Such clauses require the obligor 'to go on using endeavours until the point is reached when all reasonable endeavours have been exhausted' (see *Yewbelle* (HC) ([75] supra) at [123] and *Yewbelle* (CA) ([79] supra), or 'to do all that it reasonably could' (see *Jet2* (CA) ([84] supra) at [31]).

E (b) The obligor need only do that which has a significant (see *The Talisman* ([71] supra) or real prospect of success (see *Yewbelle* (HC) and *Yewbelle* (CA)) in procuring the contractually-stipulated outcome.

(c) If there is an insuperable obstacle to procuring the contractually-stipulated outcome, the obligor is not required to do F anything more to overcome other problems which also stood in the way of procuring that outcome but which might have been resolved (see *Yewbelle* (CA)).

(d) The obligor is not always required to sacrifice its own commercial interests in satisfaction of its obligations (see *CPC Group* ([82] supra), but it may be G required to do so where the nature and terms of the contract indicate that it is in the parties' contemplation that the obligor should make such sacrifice (see *Jet2* (CA)).

(e) *An obligor cannot just sit back and say that it could not reasonably have done more to procure the contractually-stipulated outcome in cases where, if it had* H *asked the obligee, it might have discovered that there were other steps which could reasonably have been taken (see EDI ([59] supra).*

(f) *Once the obligee points to certain steps which the obligor could have taken to procure the contractually-stipulated outcome, the burden ordinarily shifts to the obligor to show that it took those steps, or that those steps were not* I *reasonably required, or that those steps would have been bound to fail (see EDI).* (Emphasis added.)

[117] In alignment with Lord Glennie's view cited in *KS Energy Services Ltd*, learned counsel for the defendant went further to enumerate the 'steps' taken

by the defendant which were presented and formed the position adopted by the defendant during the trial at the High Court. These 'steps' referred to email correspondence sent by the defendant on 25 May 2015 and 22 June 2015 to the plaintiff, inquiring about the justification for the plaintiff's business decision to charge lower rates than those agreed upon in the agreement for the advertisements. Learned counsel for the defendant argued if the plaintiff had not engaged in practices of advertising for car dealers in the CBT and AUTO columns without charging the full advertisement rates or for the full advertisements (advertorials), the plaintiff may have reached their MGS target for 2015.

[118] With respect, we disagree with the approach led by learned counsel for the defendant. The 'steps' referred to in *Kumpulan Prasarana Rakyat Johor Sdn Bhd v Emercon Bina Sdn Bhd and another appeal* [2021] 1 MLJ 629 (CA) were terms implied in the development agreement which was the subject under review by the Court of Appeal. These implied terms were substantially admitted by the defendant in that case in their statement of defence. In that sense, parties in that case, in our considered view, were clear and already had prior understanding of what were the positive steps to be procured. Therefore, the burden of proof naturally shifts to the defendant to show that they had taken those steps which were identified in advance. Essentially, what we consider to be a more compelling factor is that, under the development agreement, the defendant in that case undertook to use its best endeavours rather than reasonable endeavours, the applicable test and standard of which are distinguishable from those applicable to the plaintiff in the present appeal before us.

[119] Nor Bee Ariffin JCA observed on pp 644–645:

> [45] The material express terms of the development agreement are set out in para 6(a) to (p) of the statement of claim ('SOC'). In gist they are as follows:
>
> (a) the defendant grant Bitara as the developer the sole and exclusive rights to develop the project land (section 2.1);
>
> (b) the developer shall be responsible for the entire cost of the said project as set out in para 1(b) of Appendix D (section 2.2(b));
>
> (c) the developer covenants and undertakes to be responsible for the provision of technical knowledge, skills, expertise, consultancy and such other services and works incumbent on the developer to provide relating to the said project (section 3.1(a)(i));
>
> (d) *the defendant covenants and undertakes to use its best endeavour* to assist and support the developer in applying for the approvals, licenses, consents and permits from the relevant authorities pertaining to the said project provided that such assistances or supports shall not be construed in any manner whatsoever as a guarantee or assurance that the same shall be

granted or obtained (section 3.2(b)(i));

(e) the developer shall pay the defendant the project consideration as set out in Appendix C (section 4.1);

(f) the developer shall furnish the defendant a bank guarantee to guarantee the Project Consideration (Appendix C); and

(g) the developer shall be responsible for the submission of the application to the relevant authorities for subdivision and conversion of the project land and to procure the approval thereof (section 5.2).

[46] The defendant in para 6 of the statement of defence ('SOD') admitted that those were the summary of part of the terms of the development agreement.

[47] *The plaintiff said that the development agreement also had implied terms. These implied terms were necessary to give the development transaction such business efficacy to ensure that the development agreement could be carried out.*

[48] *The implied terms were set out in para 7(a)–(d) of the SOC, namely the defendant shall apply for, and procure, the surrender and realienation of the project land prior to the development (paras (a)–(b)). Alternatively, the defendant shall take all positive and/ or reasonable steps to procure the surrender and re-alienation of the project land prior to the development (para (c). The defendant warrants that it has an unequivocal right to develop the project land and there would be no objections from the state government pertaining to the development project (para (d)).*

[49] *The implied terms were not substantially in issue. The defendant in para 7 of the SOD admitted to the implied terms except for para (d) where it was pleaded '… pada setiap masa yang material, adalah tidak munasabah untuk Defendan memberi sebarang jaminan bahawa Kerajaan Negeri tidak akan membantah berkenaan Projek tersebut'.* (Emphasis added.)

[120] Further, in our considered view, learned counsel for the defendant had also misconstrued the criterion set by Lord Glennie's view cited in *KS Energy Services Ltd*. The paras cited by the defendant do not represent the whole picture of the principle. In fact, VK Rajah JA delivering the judgement of the Singapore Court of Appeal clearly mentioned at paras 62 and 63 on pp 930–931:

[46] The phrase 'all reasonable endeavours' has not previously been considered by this court. However, the interpretation of the phrase 'best endeavours' was authoritatively set out by this court in Travista ([27] supra at [22]):

> … A best endeavours clause in a contract obliges the covenantor to 'take all those reasonable steps which a prudent and determined man, acting in his own interests and anxious to obtain planning permission [or to perform such other applicable obligation], would have taken' (see *IBM United Kingdom Ltd v Rockware Glass Ltd* [1980] FSR 335 ('IBM v Rockware') at 345; referred to in *Justlogin Pte Ltd and another v Oversea-Chinese Banking Corp Ltd and another* [2003] SGHC 262; [2004] 1 SLR 118 at [47]). As Kan Ting Chiu J stated succinctly in *Ong Khim Heng Daniel v Leonie Court Pte Ltd* [2000] 3 SLR(R) 670 ('Ong Khim Heng Daniel') at [42]:

> A covenant to use best endeavours is not a warranty to produce the desired results. It does not require the covenantor to drop everything and attend to the matter at once; the promise is to use the best endeavours to obtain the result within the agreed time. Nor does it require the covenantor to do everything conceivable; the duty is discharged by doing everything reasonable in good faith with a view to obtaining the required result within the time allowed. ...
>
> The test to determine whether a party has exercised its best endeavours is an objective one. But, it is also a composite test in that the covenantor may also take into account its own interests. While the covenantor has a duty to use its best endeavours to perform its contractual undertaking within the agreed time, the duty is discharged upon the covenantor 'doing everything reasonable in good faith with a view to obtaining the required result within the time allowed' (per Kan J in *Ong Khim Heng Daniel* at [42]). This test also involves a question of fact. ... (Emphasis added.)

[47] *Travista* lays down the following propositions regarding a 'best endeavours' obligation:

(a) The obligor has a duty to do everything reasonable in good faith with a view to procuring the contractually-stipulated outcome within the time allowed. This involves taking all those reasonable steps which a prudent and determined man, acting in the interests of the obligee (see further [52] below) and anxious to procure the contractually-stipulated outcome within the available time, would have taken.

(b) The test for determining whether a 'best endeavours' obligation has been fulfilled is an objective test.

(c) In fulfilling its obligation, the obligor can take into account its own interests.

(d) A 'best endeavours' obligation is not a warranty to procure the contractually-stipulated outcome.

(e) The amount or extent of 'endeavours' required of the obligor is determined with reference to the available time for procuring the contractually-stipulated outcome; the obligor is not required to drop everything and attend to the matter at once.

(f) Where breach of a 'best endeavours' obligation is alleged, a fact-intensive inquiry will have to be carried out.

...

[62] ... *However, without the parties specifying how these two types of 'endeavours' obligations differ and what steps are required to fulfil each type of 'endeavours' obligation, any attempt to draw a distinction between them would merely be a pointless hair-splitting exercise*. Any differences between 'all reasonable endeavours' obligations and 'best endeavours' obligations are likely to be more metaphysical than practical (see above at [59]). We therefore hold that the test for determining whether an 'all reasonable endeavours' obligation has been fulfilled should

ordinarily be the same as the test for determining whether a 'best endeavours' obligation has been fulfilled, ie, the *Travista* test (see above at 46–47) should apply in both situations. This test should ordinarily apply even if the parties use a variation of the phrase 'all reasonable endeavours' or 'best endeavours' (as the case may be). *However, the test may not be entirely applicable where the parties expressly stipulate the steps which are to be taken by the obligor to discharge its 'all reasonable endeavours' or 'best endeavours' obligation. In that scenario, the inquiry would be centred on whether the stipulated steps have been taken. It also bears emphasis that whether an 'all reasonable endeavours' or 'best endeavours' obligation has been fulfilled can only be ascertained through a fact-intensive inquiry.*

[63] We accept that an 'all reasonable endeavours' obligation is ordinarily more onerous than a 'reasonable endeavours' obligation. This is because the latter might require the obligor to take only one reasonable course of action, and not all of them. *A 'reasonable endeavours' obligation is also not subject to the standard laid down in Travista* ([27] supra at [22]) of 'all those reasonable steps which a prudent and determined man, acting in [the obligee's] interests and anxious to [procure the contractually-stipulated outcome within the available time], would have taken'. An obligor under a 'reasonable endeavours' obligation merely has to act reasonably to procure the contractually-stipulated outcome, and we do not find it helpful to define the applicable standard any further than that. *Such an obligor may well (depending on the circumstances) have to take steps which the prudent and determined man posited in the Travista test would take, but it need not necessarily do so as long as whatever it does to procure the contractually-stipulated outcome is reasonable.* (Emphasis added.)

[121] For completeness, we also referred to the following paras in *EDI Central Ltd v National Car Parks Ltd* [2011] SLT 76, where Lord Glennie, delivering the judgment of the Scottish Court of Session (Outer House), categorically stated:

[10] Clauses 6 and 13 are at the heart of the present dispute between the parties. They provide, so far as is material, as follows:

6. DISPOSAL

6.1 The Developer shall procure that the CT Project is pursued with *all reasonable endeavours* and as would be expected of a normal prudent commercial developer experienced in developments of that nature and in accordance with the Main Objectives. Save insofar as they are precluded from doing so by any confidentiality undertakings or the like, the Developer shall deliver to NCP, prior to the Developer entering into any Agreement for Lease for the same, an executive summary of such Agreement for Lease (and of such relevant Lease) (disclosing all material details of the same).

6.2 The Developer shall keep NCP advised as to the progress of all negotiations for the grant of Leases and shall as soon as reasonably practicable intimate to NCP the dates of completion of the Agreement(s) before Lease for the same and of the projected date of entry under such Agreement(s) for Lease, save insofar as they are precluded from doing so by any confidentiality undertakings or the like.

...

13. MAIN OBJECTIVES

The Developer and NCP shall use *all reasonable endeavours* to achieve the Main Objectives and shall act in good faith in respect of the same and in accordance with this Agreement.

The term 'Main Objectives' is defined in clause 1. The Main Objectives were: (a) to carry out the CT Project in a manner commensurate with a prudent commercial developer; (b) so far as reasonably practicable to minimise the period required in order to obtain the CT Required Permissions; and (c) to use reasonable endeavours to incorporate proposals for a commercially viable public car park within the CT Project for which planning permission could be obtained free from unduly onerous conditions. It was not in dispute that that referred to proposals for a car park within the Castle Terrace site. As I have already noted, the 'CT Project', which is also defined in Clause 1, comprised the whole development of the site, including the design and construction of the works and the letting of the lettable units on the market. The term 'CT Required Permissions' encompassed 'every permission, consent, permit, licence, approval and agreement' which was required, whether by statute, contract or otherwise, for the complete implementation of the CT Project.

...

[19] There was some discussion before me as to the nature of an obligation to use 'all reasonable endeavours'. Relying upon the decision of Deputy Judge Flaux QC in *Rhodia International Holdings Ltd v Huntsman International LLC* [2007] 2 Lloyds Rep 325 at paras 30–35, Mr Clark QC, for NCP, submitted that an obligation to use 'all reasonable endeavours' was a more stringent obligation, or imported a higher test, than an obligation simply to use 'reasonable endeavours'. That submission was supported by McBryde, *The Law of Contract in Scotland*, 3rd Ed at paras 8–57. Under reference to *Sheffield District Rly Co v Great Central Rly Co* (1911) 27 TLR 451, he submitted that, broadly speaking, it meant that the person on whom the obligation was placed must 'leave no stone unturned'. Mr McLean QC, for EDI, did not, I think, dissent from the proposition that the word 'all' in 'all reasonable endeavours' was sufficient to raise the bar. But he emphasised, under reference to the same paragraph in McBryde, that a party is not required under such a provision to act beyond his own commercial interests. *That submission finds some support in Rhodia at para 35, citing the judgment of Lewison J in Yewbelle Ltd v London Green Developments Ltd (Knightsbridge Green Ltd Pt 20 defendant)* [2006] EWHC 3166 (Ch)*, with the caveat, which is not in point here, that in some cases the contract may specify steps which have to be taken regardless of the commercial interest of the party required to take them*. In *Stephen v Scottish Boat Owners Mutual Insurance Association, The Talisman* 1989 SC (HL) 24 at 61, a case concerned with whether the skipper of a fishing boat had used all reasonable endeavours to save his vessel, Lord Keith of Kinkel, at p 61, said that the test was an objective one directed to ascertaining 'what an ordinarily competent fishing boat skipper might reasonably be expected to do in the same circumstances'. Mr McLean submitted that this test should be applied mutatis mutandis in the present case. Equating 'all reasonable endeavours' with 'best endeavours', which was the analysis adopted in Rhodia, Mr McLean referred me to a number of other statements from other cases. In *IBM United Kingdom Ltd*

v Rockware Glass Ltd [1980] FSR 335, the Court of Appeal held that a person under an obligation to use best endeavours was obliged to take steps 'which a prudent, determined and reasonable owner, acting in his own interests and designed to achieve that result would take'. He also referred to the decision of the Court of Appeal in *Yewbelle Ltd v London Green Developments Ltd* [2007] EWCA Civ 475. Though the appeal from Lewison J was allowed, his decision on the meaning of all reasonable endeavours was expressly approved on this point in the Court of Appeal: see per Lloyd LJ at paras 29–33. Further, at paras 103 and 127, the Court of Appeal emphasised, in agreement with the judge, that the obligation to use all reasonable endeavours does not require a party to go on trying when it is clear that in one respect at least he must fail. Thus, if there were two or three obstacles to be overcome, and it became clear that one of those obstacles was in fact insuperable, there would be no obligation on the party to continue using all reasonable endeavours to overcome the other two. That would be a fruitless exercise.

[20] There was little between the parties on this point. I accept the submission that the obligation to use 'all reasonable endeavours' is a more onerous obligation than one simply to use 'reasonable endeavours'. I do not have to consider whether or not it is the same as one to use 'best endeavours', though I would have thought that any difference is likely to be metaphysical rather than practical. It is difficult to conceive that an obligation to use 'best endeavours' requires a party to take steps which are ex hypothesi unreasonable. *I base my conclusion that an obligation to use 'all reasonable endeavours' is more onerous than one merely to use 'reasonable endeavours' on the analysis adopted in Rhodia, under reference to other authorities; but I am fortified in that conclusion by the recent opinion of Lord Hodge in Mactaggart & Mickel Homes Ltd v Hunter* [2010] CSOH 130 *at para 63. It is not, I think, helpful to attempt to define more precisely what is encompassed by that obligation. It will, as Lord Hodge suggests, require the court to consider whether there were reasonable steps which could have been taken but were not taken. The party on whom the obligation is placed will be expected to explore all avenues reasonably open to him, and to explore them all to the extent reasonable. But unless the contract otherwise stipulates, he is not required to act against his own commercial interests*: see *Yewbelle*, and see also the recent decision of Vos J in *CPC Group Ltd v Qatari Diar Real Estate Investment Co* [2010] EWHC 1535 (Ch) at para 252, a decision which came to my attention after the conclusion of the proof. That point is, in any event, made clear here by the reference in clause 6 to the standards of 'a normal prudent commercial developer experienced in developments of that nature'. The word 'prudent' points to a legitimate consideration of his own financial and commercial interests. Nor is he required to persist where it is clear that further efforts will be fruitless. The reference to the developer being 'experienced in developments of that nature', shows that he is entitled to rely upon his judgement, informed by his experience, of what is and is not likely to bear fruit. If it is clear that he cannot succeed whatever further avenues he may take, he cannot be expected to continue wasting time, effort and expense. So also, if it becomes clear that one necessary hurdle cannot be overcome, he will not be expected to waste his time seeking to overcome other problems, since overcoming them would achieve nothing.

[21] I would add only two points. The first is a point of detail which emerges from para 105 of the judgment of the Court of Appeal in Yewbelle. Lloyd LJ there emphasises that it may well be part of the obligation to use *all reasonable endeavours*

> for the party on whom the obligation is placed to inform the other party of any difficulties he is encountering and, in an appropriate case, to see whether that party has a possible solution to the problem. That must be right. A party cannot just sit back and say that he could not reasonably have done more when, if it had had asked the other party to the transaction, it might have discovered that there were other steps which could reasonably have been taken. But all will depend upon the circumstances.
>
> [22] The other point concerns the onus of proof. As I said earlier, NCP led at proof. This was because they accepted that the burden was on them to show that EDI were in breach, so as to give a basis for the mutuality argument. But it does not seem to me that the burden necessarily remains throughout on NCP. My tentative view is that if NCP can point to steps which could have been taken, by evidence (or possibly by pleading), the evidential burden may shift to EDI to show, as the case may be, that they took those steps, that they could not reasonably have been expected to take them or that such steps would have been bound to fail. It is EDI who are likely to have the evidence on these points and, once a sufficient case has been raised by NCP, the burden must ultimately be on EDI to establish that they used all reasonable endeavours as required by the Agreement: cf *MacTaggart & Mickel Homes Limited* at para 58 in which Lord Hodge refers to the onus of proof being on the party asserting that he has used reasonable endeavours. However, the point was not argued before me and, in the conclusions I have reached, it makes no difference to the outcome. (Emphasis added.)

[122] In our perusal of the central feature of the reasoning on the subject, we find that the original context of Lord Glennie's remark in paras 19–21 of *EDI Central Ltd*, cited above, pertained to the obligation to use 'all reasonable endeavours' as evident from the language of the contract reproduced in para 10 of the same judgment. Lord Glennie's observation of the law was cited with approval by VK Rajah JA in *KS Energy Services Ltd*, also in the context of the 'all reasonable endeavours' clause and the 'best endeavours' clause.

[123] In both cases, there was a consensus that an obligation to exercise 'reasonable endeavours' is less onerous than an obligation to exercise 'all reasonable endeavours' and that of 'best endeavours'. It was also made plain in *KS Energy Services Ltd* that an obligor under a 'reasonable endeavours' obligation is not subject to the *Travista test*. *KS Energy Services Ltd* was later cited with approval by our Court of Appeal in *Kumpulan Prasarana Rakyat Johor Sdn Bhd v Emercon Bina Sdn Bhd and another appeal* [2021] 1 MLJ 629 (CA), also in the context of a 'best endeavours' obligation.

[124] With respect, by attempting to fit the guidance in these cases to the facts of the present appeal, learned counsel for the defendant was trying to force a square peg into a round hole. To our mind, the 'steps' referred to in those cases do not apply to the facts of the present appeal. In the appeal before us, the defendant relied on the email correspondence dated 25 May 2015 and 22 June

2015 several years after the 2013 agreement was entered into by the parties. In our considered view, the defendant cannot rely on these emails to amplify or modify the 2013 agreement.

[125] In our judgment, the law is clear. We agree with the plaintiff that the burden of proof in reliance on a reasonable endeavours clause falls first on the obligee, ie, the defendant.

[126] It follows that, unlike in the case of a guaranteed undertaking where it is sufficient for the obligee to prove that the aim for the contractually guaranteed result has not been procured, in the case of an obligation of reasonable endeavour, proof of the promised result is not achieved is not sufficient since the mere fact that the result has not been achieved does not necessarily mean that the obligor has not properly performed its obligation. It is incumbent upon the obligee to prove that the obligor has not discharged its obligation with the reasonable diligence required.

[127] The learned panel of the Court of Appeal at para 37 had this to say:

> [37] For completeness, we find that the respondent has also not led sufficient evidence to satisfy us that the appellant did not use its reasonable endeavour required under cl 4.3 of the 2013 agreement to find any liability on the part of the appellant in justification of its set off and counterclaim on this aspect.

[128] We agree with the view expressed by the learned panel of the Court of Appeal. The Court of Appeal unanimously held that the defendant has not led sufficient evidence that the plaintiff did not use their reasonable endeavour required under cl 4.3. We, therefore, shall refrain from further analysis of the evidence and findings thereon.

[129] We hold that the burden of proof does not shift to the plaintiff as contended by the defendant. The burden of proof lies with the defendant as the obligee is consistent with the classic juridical aphorism 'semper necessitas probandi incumbit ei qui agit' (he who asserts must prove) which is statutorily recognised by s 101 of our Evidence Act 1950 (Act 50). There is no extrinsic evidence led by the defendant to support their contention that the plaintiff had failed to exercise reasonable endeavour as stipulated under cl 4.3 of the 2013 agreement. The defendant has failed to discharge their burden of proof.

[130] For these reasons, we answer question 5 in the *NEGATIVE*.

Generalia specialibus maxim and reasonable endeavours clause

[131] We now determine the final question:

Question 6: Whether the principle of *generalia specialibus non derogant* is to be applied when construing a specific contractual obligation over a general 'reasonable endeavours' clause?

[132] Learned counsel for the defendant implored us to consider the application of the *generalia specialibus non derogant* maxim to the 2013 agreement. In the appeal before us, the alleged conflict upon which the defendant insisted is between the specific MGS obligation as set out in cll 4.1 and 4.2 read together with cll 1 and 4.5 as well as the letter of guarantee in Annexure 1 of the 2013 agreement against the general 'reasonable endeavours' provision provided under cl 4.3. Therefore, on that premise, the defendant tries to impress upon us that the Court of Appeal's decision derogated from the *generalia specialibus* maxim, as cll 4.1 and 4.2 should prevail over cl 4.3.

[133] We disagree. It is settled that where a contract contains general provisions and specific provisions, the specific provisions will be given greater weight than the general provisions where the facts to which the contract is to be applied fall within the scope of the specific provisions.

[134] The Supreme Court of Ireland in *T Niall Welch, Plaintiff, v Bowmaker (Ireland) Limited and The Governor and Company of the Bank of Ireland, Defendants* [1980] IR 251 (SC) recognised the application of the legal maxim *generalia specialibus non derogant* in the interpretation of a debenture where Henchy J observed on pp 254–255:

> *The relevant rule of interpretation is that encapsulated in the maxim generalia specialibus non derogant*. In plain English, when you find a particular situation dealt with in special terms, and later in the same document you find general words used which could be said to encompass and deal differently with that particular situation, the general words will not, in the absence of an indication of a definite intention to do so, be held to undermine or abrogate the effect of the special words which were used to deal with the particular situation. *This is but a common sense way of giving effect to the true or primary intention of the draftsman*, for the general words will usually have been used in inadvertence of the fact that the particular situation has already been specially dealt with. (Emphasis added.)

[135] Parke J, echoing Hench J in the majority decision, observed at p 261 as follows:

> *Although the maxim generalia specialibus non derogant is usually applied to the construction of statutes in order to prevent an unintentional repeal of a specific provision in a prior section by a subsequent section using general words, I respectfully agree with Mr Justice Henchy in the judgment which he has just delivered that it is of very considerable assistance in the construction of documents inter partes and is particularly apt to the present case*. (Emphasis added.)

[136] That case was cited with approval by Foxton J in *Capita Business Services Ltd v IBM United Kingdom Ltd and another company* [2023] All ER (D) 127 (Oct); [2023] EWHC 2623 (Comm).

[137] The maxim was also considered in the interpretation of contracts by the House of Lords in *Glynn v Margetson & Co* [1893] AC 351 (HL) and the English Court of Appeal in *Milton Furniture Ltd v Brit Insurance Ltd* [2015] All ER (D) 82 (Jul); [2015] EWCA Civ 671 (CA), *CLP Holding Company Ltd v Singh and another* [2014] All ER (D) 08 (Oct); [2014] EWCA Civ 1103 (CA), *Compass Group UK and Ireland Ltd (t/a Medirest) v Mid Essex Hospital Services NHS Trust* [2013] EWCA Civ 200 (CA), *Golden Fleece Maritime Inc and another v St Shipping and Transport Inc* [2008] EWCA Civ 584 (CA), *Telewest Communications plc and another v Commissioners of Customs And Excise* [2005] EWCA Civ 102 (CA), *Hewden Tower Cranes Limited v Yarm Road Limited and another* [2003] EWCA Civ 1127 (CA), *William Sindall plc v Cambridgeshire County Council* [1994] 3 All ER 932 (CA) and *Curtis v Stovin* (1889) 22 QBD 513 (CA).

[138] Closer to home, the *generalia specialibus* maxim was also referred to and applied by our court in *Qatar Islamic Bank v Asian Finance Bank Bhd & Ors* [2015] 7 MLJ 445 (HC).

[139] Canons of construction should be applied only when the language of the contract is ambiguous. The *generalia specialibus* maxim specifically resolves ambiguities that emerge when two provisions are examined together. If the focus remains on the general provision alone, no ambiguity may be evident. However, the issue arises and the maxim becomes relevant when the broad language of a general provision is compared with the specific language of a special provision.

[140] It is also important to note that the *generalia specialibus* maxim is not a technical rule of interpretation but rather it is a consequence of the principle that a legal instrument of any character, be it a statute or a contract, should be interpreted as a coherent whole and represents simple common sense and ordinary usage. Lord Cooke of Thorndon pointed out in *Effort Shipping Co Ltd v Linden Management SA and another; The Giannis NK* [1998] 1 All ER 495 (HL) at p 513:

> *I would add only that the generalia specialibus maxim, as its traditional expression in Latin indeed suggests, is not a technical rule peculiar to English statutory interpretation. Rather it represents simple common sense and ordinary usage*. (Emphasis added.)

[141] First, it goes without saying that as a matter of general principle, common sense and ordinary usage must apply to give effect to the contract as

a whole regardless of whether the clauses in question can be said to bear a relationship of general operation and special/specific exception.

[142] Second, the application of the maxim on a contract would require one to construe a clause as a specific provision in the contract with another clause as the more general provision thereby bringing the two into harmony.

[143] However, this is not always possible where the clauses under review may simply be different provisions with overlapping aims and applications. In our considered view, cll 4.1 and 4.2 provided for the desired results to be achieved without any guarantee whereas cl 4.3 provided for the standard for performance. There is no inconsistency between these clauses so that one could say the general is taken to give way to the specific.

[144] Therefore, on that basis, the *generalia specialibus* maxim does not offer much help to the defendant's case.

[145] Additionally, even if a conflict exists between cll 4.1 and 4.2 on the one hand and cl 4.3 on the other, which they do not, it is our considered view that, read as a whole, cl 4.3 merely qualifies cll 4.1 and 4.2 and that effect must be given to all clauses.

[146] On this point, Lord Wrenbury delivering the speech of the Board of the Privy Council in *Forbes v Git & Ors* [1922] 1 AC 256 (PC) observed at p 259:

> The principle of law to be applied may be stated in few words. If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant and the earlier clause prevails. In this case the two clauses cannot be reconciled and the earlier provision in the deed prevails over the later. Thus, if A covenants to pay 100l and the deed subsequently provides that he shall not be liable under his covenant, that later provision is to be rejected as repugnant and void, for it altogether destroys the covenant. *But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of t he parties as disclosed by the deed as a whole. Thus, if A covenants to pay 100l and the deed subsequently provides that he shall be liable to pay only at a future named date or in a future defined event or if at the due date of payment he holds a defined office, then the absolute covenant to pay is controlled by the words qualifying the obligation in manner described.* (Emphasis added.)

[147] Similarly, Sir Kim Lewison in his work, *The Interpretation of Contracts* (2015) (6th Ed, Sweet & Maxwell) at p 522 rightly pointed out that:

> ... contract documents should as far as possible be read as complementing each other and therefore as expressing the parties' intentions in a consistent and coherent manner. *Only in the case of a clear and irreconcilable discrepancy is it necessary to resort*

to the contractual order of precedence to resolve it. (Emphasis added.)

[148] In the premises, we *DECLINE TO ANSWER* Question 6.

CONCLUSION

[149] In the upshot, we take the view that the Court of Appeal committed no appealable error warranting appellate intervention. After giving much consideration to the entire submissions and for the reasons above stated, we affirm the decision of the Court of Appeal and dismiss the defendant's appeal with costs.

[150] We thank learned counsel for their able oral and written submissions which have assisted us in reaching this unanimous decision.

Appeal dismissed.

Reported by Nabilah Syahida Abdullah Salleh